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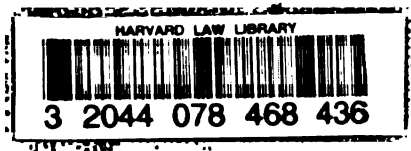
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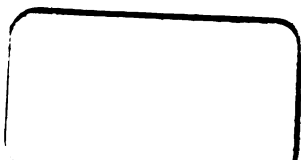
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KENTUCKY OPINIONS

CONTAINING THE

UNREPORTED DECISIONS

OF THE

COURT OF APPEALS

COMPILED BY

J. MORGAN CHINN

Ex-Clerk Court of Appeals

Under the Supervision of

J. K. ROBERTS, ESQ., OF THE KENTUCKY BAR

VOL. V.

From September 21, 1871, to January 3, 1872

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KENTUCKY COURT OF APPEALS

1871

JOHN ALLEN'S EXECUTOR *v.* ISAAC ALLEN.

Wills—Probate—Undue Influence.

The will was signed by the testator in the presence of the witnesses and attested by them in his presence and at his request. He was then of sound mind and memory and with mental capacity sufficient to fully comprehend what he was doing and there is no proof of undue influence.

Wills—Son Forfeits Claim to Parental Kindness.

Although the testator has stated that he intended to give his home place to his son, and there may be no doubt of his intention at the time, yet the bad treatment of the father by the son was the sole cause of the father depriving him of any interest in the estate.

Wills—Probate—Appeal—Court of Appeals Will Render Final Judgment on Reversal.

Where an appeal is taken from a judgment rendered in proceeding to probate a will the court of appeals will render a final judgment on reversal of the case.

APPEAL FROM GRAYSON CIRCUIT COURT.

September 21, 1871.

OPINION BY JUDGE PRYOR:

John S. Allen died in the county of Grayson, leaving a paper purporting to be his last will and testament, by which he devised the greater portion of his estate to his grandchildren, the children of his deceased daughter, Mrs. Cockerill.

The appellee Isaac Allen, a son of the testator, opposed the probate of the paper as the last will of his father, and upon an issue of *devistavit vel non*, made in the Grayson circuit court, the jury by their verdict said: "That the paper was not the last will and testament of John Allen," and this verdict being sustained by the court below, the case is brought here for revision. The paper produced as the will of the intestate was written by Dr. R. W. Brandon, a man of intelligence and the family physician of Allen. It was written in the presence of the

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two subscribing witnesses who state, as well as the draftsman, Doctor Brandon, that the contents of the will were all dictated by the old man without scarcely a suggestion from any one present. That it was signed by him in their presence, and attested by them in his presence and at his request as his last will. He was then of sound mind and memory, and with mental capacity sufficient to fully comprehend and understand what he was doing. The ground relied on, however, for setting aside this paper, is that it was procured by the exercise of an undue influence of one Johnson and some members of his family over the old man. After a careful examination of all the testimony offered on this point the court has been unable to discover where Johnson or his family exercised, or attempted to exercise, any influence over the old man in regard to the execution of the will. They expressed to some witnesses, in the presence of the old man, their gratification at the execution of the paper, and seemed to be acquainted with its contents, and said that the old man had always taken their advice except in one instance when he refused to remove some old lady from his premises. Johnson nor his family derived no benefit from any provision of the will, and have no motive, so far as this record discloses, to induce the old man to disinherit his son. It is true that the old man frequently stated that he intended to give his son the home place, and there is no doubt but what he intended to dispose of his property in that way when these statements were made. His affection for his son seems to have lessened after this time, and in the presence of several of his neighbors he declared that his son should receive no more of his estate. These statements were made when Johnson was not living in the county, and were caused by the bad treatment of the father by the son. This bad treatment is clearly established by the proof, and the son's own conduct induced the father to deprive him of any interest in the estate. His property was worth not exceeding \$2,000. One of the children of his deceased daughter (a little girl), who is the principal devisee under the will, after the death of the mother had been taken by the old man to raise. Her father died in the army, and deviser was much devoted to her. With this affection for this little girl it is not unnatural that he should make her the recipient of the greater portion of his small es-

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tate. The son had forfeited all claim upon parental kindness, and the proof in this case fully justifies the old man in making his two orphan grandchildren the objects of his bounty. It is adjudged by this court that the paper dated the 29th of March, 1868, signed by John S. Allen as his last will, and attested by I. G. Clagett and George Moosley, is the true last will and testament of John Allen. The order of the Grayson circuit court rejecting said will is reversed, and that court is directed to certify the proceedings and the judgment of this court to the Grayson county court, with directions to admit the will to probate and enter the same of record.

Wintersmith, for appellant.

Conklin, for appellee.

JONATHAN COOPER v. NATHANIEL GRIFFIN ET AL.**Writ of Possession.**

It is error to issue a writ of possession for more land than that sold under the judgment, and to that extent it may be enjoined.

APPEAL FROM FLEMING CIRCUIT COURT.

October 20, 1871.

OPINION BY JUDGE PRYOR:

After a careful examination of the record in this case and the brief filed by counsel for appellant, we have been unable to perceive the object of this appeal. It seems that Pearce had purchased twenty-five acres of appellant's land, sold under a judgment foreclosing a mortgage executed by appellant to one Evans. That during the pendency of this suit to foreclose the mortgage, Pearce had also purchased, under execution at sheriff's sale, the balance of the tract of land of which this twenty-five acres was a part. This last purchase had no connection whatever with the suit to foreclose the mortgage. Pearce sold or transferred both of his purchases to the appellee Griffin, and Griffin, by a motion made in the suit to foreclose the mortgage, obtained a writ of possession. The clerk in issuing this writ

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not only included the twenty-five acres sold under the judgment, but the writ embraced the whole of appellant's farm. This present suit was then brought for the purpose of restraining Griffin and all others from enforcing this writ of possession. The petition also alleges that Pearce, when he bought the land, promised that when it was sold by him that all of the 'excess over and above paying his debt and cost should belong to the appellant. A notice was given appellant by the appellee Griffin that on a certain day of the term he would move to dissolve the injunction. This motion was heard, and the injunction perpetuated except as to the twenty-five acres of land purchased under the judgment foreclosing the mortgage, and a writ of possession awarded the appellee Griffin for this twenty-five acres; of this the appellant makes no complaint and alleges in his petition that he is willing the appellee shall have the possession of the twenty-five acres. No other question seems to have been decided, and as to all other questions the suit is yet pending and undetermined. The judgment of the court below is affirmed.

Cord, for appellant.

Botts, for appellees.

GEORGE CLINTON v. MATES BENEVOLENT ASSOCIATION.

Process—Summons—Variance—Must be Taken Advantage of by Motion—Waiver.

The note sued on was made payable to the Cincinnati Mates Benevolent Association. The warrant was taken out in the name of the Mates Benevolent Association of Cincinnati. This variance, if fatal, should have been taken advantage of by motion to quash the writ.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 15, 1871.

OPINION BY JUDGE LINDSAY:

The act to increase the jurisdiction of the mayor of the city of Newport, approved March 10, 1856, provides "that the same powers and jurisdiction now in force under the *Revised Statutes, Chapter 27, Article 16 and 17*, defining the jurisdiction of quar-

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terly courts, and the powers of the presiding judge of county courts be, and the same are hereby conferred upon the mayor of the city of Newport." At the time this act was passed that portion of *Section 16, Chapter 27, Revised Statutes*, conferring civil jurisdiction upon quarterly courts had been repealed by the adoption of the civil code of practice, and if the act be literally interpreted it conferred no jurisdiction whatever in civil cases upon the mayor of Newport.

Such an interpretation would have the effect of rendering it inoperative in this regard, and is, therefore, inadmissible.

We conclude that it was the intention of the legislature to give to the mayor of said city jurisdiction similar to that given to quarterly courts by the revised statutes.

The note sued on was made payable to the "Cincinnati Mates' Benevolent Association." The warrant was taken out in the name of the "Mates' Benevolent Association of Cincinnati." This variance, if fatal, should have been taken advantage of by motion to quash the writ. The warrant was merely the summons, the execution of which brought the appellant before the court. He could, and did, waive objection to the informality complained of. The plea that there is no such corporation as the "Mates Benevolent of Cincinnati" was not good. The plea was to the warrant of summons, and not to the note which constituted the pleadings of the appellee. It is not charged that there are two associations. The one bearing the title set out in the note. The plea was an attempt to make the case turn upon the clerical mistake of the mayor, and did not go to the merits of the controversy. The witness Carmony was not inconsistent. He had no direct or certain interest in the result of the litigation, and was no party to the action. Such interest as he may have had went to his credibility and not his competency.

The court properly refused to instruct the jury to find for the defendant, and as the instruction given for the appellee was not objected to, we can not here review it.

Judgment affirmed.

Fearons, Hawkins, Webster, for appellant.

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CHAMBERLAIN & TAPP v. W. J. BREWER, ETC.

Trials—Law and Facts Submitted to Court.

Where the law and facts are submitted to the court it acts in the double capacity of judge and jury, and its finding is entitled to the weight of the verdict of a jury, which will not be disturbed unless palpably against the evidence.

Sheriffs and Constable—Bond Void Where Sureties Were Induced to Sign the Bond Under Misapprehension.

If Watkins and other sureties of the sheriff were induced to believe that the name of Brewer, affixed to the bond before their signatures, was his act and deed, and the same was not his act, and did not bind him, then their own attempted execution of the bond was not obligatory on them.

APPEAL FROM HENRY CIRCUIT COURT.

October 6, 1871.

OPINION BY JUDGE HARDIN:

This case is here for the third time in this court on the appeal of the present appellants. The decision of the first appeal (3 *Bush* 561) was in effect, that if Watkins and other sureties of the sheriff were induced to believe that the name of D. L. Brewer, affixed to the bond before their own signatures, was his act and deed, and that the same was not his act and did not bind him, then their own attempted execution of the bond was not obligatory on them. A trial of the case in conformity to that decision resulted in a judgment for the defendants, which in an opinion manifesting much hesitation a majority of this court reversed, and remanded the cause with instructions to bring the representative of D. L. Brewer before the court; which was done, and upon another trial on the evidence previously adduced and additional testimony for the defendants, a judgment was again rendered for them.

In view of the fact that the court to which the law and facts were submitted acted in the double capacity of judge and jury, and its judgment is entitled to the weight of the verdict of a jury, which ought not to be disturbed unless palpably against

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the evidence; and that that is the same decision of the court below, in favor of appellants on the facts, we do not feel at liberty in view of all the evidence to reverse the judgment. Therefore the judgment is affirmed.

Judge Pryor not sitting.

Pryor & Barber, for appellants.

Scott, for appellee.

WILLIAM H. CORD *v.* NEWMAN A. GLASSCOCK, ETC.

Attorney and Client—Lien for Fee Notice to Defendant.

The demand in this case not being for the recovery of incidental damages, but for property, and a claim in money on which \$200 was paid on the compromised judgment, the appellee had a lien thereon for his fee as the plaintiff's attorney, of which the pendency of the suit was notice to the defendant.

APPEAL FROM THE FLEMING CIRCUIT COURT.

October 21, 1871.

OPINION BY JUDGE HARDIN:

The demand in this case not being for the recovery of incidental damages, but for property, and a claim in money on which \$200 were paid on the compromise judgment, the appellee had a lien thereon for his fee as the plaintiff's attorney, of which the pendency of the suit was notice to the defendants according to the decision of this court in the case of *Stephens & Hermes v. Farrar Brothers*, 4 Bush 13, and the lien was properly asserted by the motion for a rule on the grounds disclosed, and the court therefore erred in refusing to award the rule for the purpose of litigating the defendant's claim.

Therefore the judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

Cord, for appellant.

Andrews, for appellee.

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GEO. B. BLANCHARD *v.* G. W. HERBERT.

Wills—Construction—Specific Devise of Land With Lien Thereon—Residuary Estate Must Pay Debt.

The testatrix devised to her son Albert a house and lot for which she was indebted in the sum of \$1,500, for which there was a lien on the property. She made some other specific devises; and without giving directions as to the payment of her debts, provided that the balance of her estate, both real and personal, be divided between her daughter and her sons, John, George and Albert.

Held, that although the creditor might have enforced his lien as security for his debt, it was nevertheless as much the debt of the testatrix as if the lien did not exist, and the acceptance by Albert of the devise to him did not imply an undertaking on his part to assume and pay the debt, nor exempt the general devisees from contribution thereto. On the contrary, as between him and the devisees of the residuary estate, he was himself exempt from contribution.

Wills—General Devisees.

The rights of general devisees are subservient to the rights of those to whom property has been specifically devised with respect to the payment of the debts of the testator.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 14, 1871.

OPINION BY JUDGE HARDIN:

This appeal involves a single question in the construction of the will of Louisa J. Blanchard, deceased. By the will, she devised to her son, Albert Blanchard, a house and lot on Chestnut street, in Louisville, for which she was indebted to Geo. W. Herbert in about the sum of \$1,500, for which there was a lien on the property. She made some other specific devises; and without giving directions as to the payment of her debts, provided that the balance of her estate both real and personal be equally divided between her daughter Oliva, now Mrs. Briggs, and her sons John, George and Albert Blanchard. This residuary estate consisted principally of several hundred acres of land in McLean county; and the judgment in this case provides for selling enough of the land to pay the debts of the testatrix, including that owing to Herbert, there being little or no personal estate, thus relieving the property specially devised to Albert Blanchard, of the lien of Herbert. Of this, the appellant Geo.

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Blanchard complains, and it is contended for him in the argument that inasmuch as the lands passed under the general residuary clause of the will and was neither specifically devised for the payment of debts, nor charged with them, Albert Blanchard, as the specific devisee of the house and lot in Louisville, was not entitled to have the lien of Herbert removed, either by a sale of the land or by contribution from the other devisee, but that he took the devise *cum onere*. This would doubtless be so if it appeared from the will that the testatrix intended to charge the devise to Albert Blanchard with payment of her debt to Herbert, or the incumbrance on the property was not a debt or claim against her estate, and one which she had never undertaken to assume. But although the creditor might have enforced his lien as security for his debt, it was nevertheless as much the debt of Mrs. Blanchard's estate as if the lien did not exist, and the acceptance by Albert Blanchard of the devise to him did not imply an undertaking on his part to assume and pay the debt, nor exempt the general devisees from contribution thereto. On the contrary, as between him and the devisees of the residuary estate, he was himself exempt from contribution. The right of general devisees being subservient to the rights of those to whom property is specifically devised with respect to the payment of the debts, as a general rule.

Wherefore the judgment is affirmed.

Pirtle & Caruth, for appellant.

Gibson, for appellee.

MILTON WORMICK, ETC., v. DAVID BRYANT, ETC.

Vendor and Purchaser—Parol Contract for Land—Abandonment by Vendor—Purchase Money.

Appellant's vendor having elected to abandon the parol contract for the sale of the land to their ancestor, they have a lien on the land for the purchase money, and his subsequent vendee, with notice of appellant's lien, can occupy no better position than his vendor.

APPEAL FROM ADAIR CIRCUIT COURT.

February 27, 1872.

Opinion of the Court.

OPINION BY JUDGE PETERS:

Appellant's vendor having elected to abandon the parol contract for the sale of the land to their ancestor, they certainly had a lien on the land for the purchase money which had been actually paid, which would have been enforceable if he had not parted with it. And his subsequent vendee, with notice of appellant's lien, can occupy no better position than his vendor. And if he bought with notice of the lien, as is alleged in the petition, he takes it subject to the incumbrance. Wherefore the judgment is reversed, and the cause is remanded with directions to overrule the demurrer to the petition and for further proceedings consistent herewith.

Winfrey & Winfrey, for appellees.

L. TOWLER v. JNO. R. WILSON.

Trial—Motion for Non-Suit—When to Be Made.

A motion for non-suit is usually made immediately after the plaintiff has closed his evidence, on the grounds that the testimony fails to make out a cause of action against the defendant.

Second Trial—Exception to Instructions.

As the ruling of the court in giving the instructions was not excepted to by appellant, the Court of Appeals will not review them.

APPEAL FROM HENDERSON CIRCUIT COURT.

March 11, 1872.

OPINION BY JUDGE PETERS:

A motion for a non-suit is usually made immediately after the plaintiff below has closed his evidence on the ground that the testimony fails to make out a cause of action against the defendant; in this case *prima facie* the note itself was sufficient to authorize a recovery, and without evidence to sustain the defense relied on by the defendant, judgment would have gone as a matter of course, and motion for a non-suit after the defendant had closed his evidence was properly overruled.

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Although we can not concur with the court below in some of the propositions submitted in the instructions to the jury as the correct exposition of the law of the case, still, as the ruling of the court in giving the instructions to the jury was not excepted to by appellant, we can not review them, as has been repeatedly held by this court.

Wherefore the judgment must be affirmed.

Vance & Merritt, for appellant.

R. H. Cunningham, for appellee.

DICEY WHITESIDES v. JAMES BRIEN'S EXECUTOR, ETC.**Judgments—Modification—Vacation—Jurisdiction.**

Unless one or more of the grounds embraced in Sections 579-373 of the Civil Code of Practice are set forth in the petition to vacate the judgment the court has no jurisdiction of the case.

Trusts—Beneficial Interests Not Subject to Execution.

Where land is held in trust for another their beneficial interests are not subject to execution, and the trustee can not sell under execution to pay his own debt.

APPEAL FROM MARSHALL CIRCUIT COURT.

March 19, 1872.

OPINION BY JUDGE PETERS:

The cause set forth in the petition to vacate the judgment of the 11th of June, 1868, is not embraced in Sections 579 nor 373 of the *Code of Practice*. And unless one or more of the grounds therein enumerated existed for modifying, or vacating the judgment, the court below had no jurisdiction of the case.

But we do not perceive how appellants were prejudiced by the judgment. They certainly had no legal title to the land, either in fee, for life, or for a term of years, if the same was held under the wills of Whitesides and McCracken, as appears to be the case from the record before us. The legal title passed by the will of Whitesides to McCracken—and by his will Brien

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was constituted trustee to hold the legal title for appellants. And under *Sec. 1, Art. 13, Chap. 36, 1 Vol. R. S., p. 482*, their beneficial interest in the land was not subject to sale under execution. Especially could not the trustee sell under an execution to pay his own debt.

Let the judgment be affirmed.

J. B. Husband, Scott, for appellant.

Gilbert, for appellee.

W. B. ALLEN, ETC., v. G. C. McGRATH.

Husband and Wife—Separate Estate—Action of Wife May Deprive Her of the Right to Claim Against Husband's Creditors.

Where a wife permits her husband, with her own knowledge and consent, to use her money for his own purposes and to announce to his creditors and customers by his public advertisements and in the sale of his goods that he was the owner of the establishment, she thereby deprives herself of the right to assert her claim to the property as against his creditors.

Husband and Wife—Wife May Change Nature and Character of Separate Estate.

There is no principle of law or equity that would prevent the wife from changing the nature and character of her separate estate, created by parol, and vesting husband with absolute title.

APPEAL FROM SHELBY CIRCUIT COURT.

October 27, 1871.

OPINION BY JUDGE PRYOR:

Mrs. Allen derived an estate from her father in land and other property valued at several thousand dollars. The real estate she disposed of in conjunction with her husband and invested a portion of the proceeds in a house and lot in Shelbyville, Ky., and the balance of the money, being about two thousand dollars, was deposited in the banking house of Edwards & Co. to the credit of Walker B. Allen, as trustee for his wife, M. I. Allen. This money was afterwards used in the purchase of a lot of goods, wares, etc., by the husband of Mrs. Allen from the appellant William B. Courtney, and the testimony of the wife

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shows that the goods were hers, and held and controlled by the husband as her separate estate. Shortly after this sale by Courtney of the goods, he re-purchases them from Mrs. Allen, as is evidenced by the written contract between the parties, and made a part of this record.

The husband at the time, as the proof shows, was insolvent and had but a few months previously taken the benefits of the bankrupt law. After the purchase of the goods by Courtney, the appellees who were the creditors of the husband Walker B. Allen filed their petition in equity against Courtney and Allen, alleging that the appellant W. B. Allen had sold these goods to Courtney in contemplation of insolvency, and with the intention and design of preferring the defendant Courtney, who was a creditor, to the exclusion of his other creditors, including the appellees. They also allege that Allen's indebtedness exceeded the value of the property owned by him. Appellants answer this petition alleging that Mrs. Allen was the owner of the goods and held them as her separate estate; that they were sold by her to Courtney, and the only interest that the husband had in them was the right to control and dispose of them as the agent of his wife. The court below subjected the goods to the payment of the debts of Allen, and from this judgment Allen and Courtney prosecute this appeal, the wife of Allen not being a party to the controversy. There is no doubt but what a married woman may, with the monies arising from the proceeds of her own property, with the consent of the husband, invest it in property, to be held for her separate use. The money in this case seems to have been received by the husband as trustee of the wife, and with the intention and purpose at the time of securing it to the wife as her separate estate. The money was the proceeds of the sale of her own property, and when deposited in bank to her credit or that of the husband as trustee, and no creditor of the husband could have subjected it to the payment of his debts, she was in equity entitled to it, and there was no fraud in such a transaction upon the husband's creditors. The action of the wife, however, in regard to a separate estate thus created, may be of such a character as would deprive her of the right to assert any claim to it as against

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the husband's creditors. There is no principle of law or equity that would preclude the wife from changing the nature and character of a separate estate created by parol of personal property as in this case and vesting the husband with the absolute right to it. In this case the only evidence of the existence of this separate estate, independently of the knowledge of the husband and wife on the subject, was the entry by the clerk of the bank upon his books of the money to the credit of W. B. Allen as trustee for his wife. The husband, after the alleged purchase of the goods by the wife, or by him for the wife from Courtney, made purchases in the city of Louisville for the purpose of replenishing the stock in his own name, and upon his own credit. The sign upon the door of the business house was that of W. B. Allen. All of the transactions in the sale of the goods were in his name, until the whole stock is to be disposed of, and then it is done in the name of the wife. The clerk in the store seems not to have known that the goods were Mrs. Allen's until the sale to Courtney, and no one except the husband and wife, and perhaps Courtney, knew of the existence of the separate estate upon the part of the wife in the goods that were being bought and sold every day in the name of the husband. The appellant Courtney was the endorser or liable for Allen on some debt in Louisville for about \$300. Allen had also become liable to him by reason of a board bill of his, that Allen had assumed and failed to pay. He stated to others that his object in buying these goods was to secure himself in these liabilities; and there is no doubt but what this alone prompted him to make the purchase. The wife is setting up no claim to this property, except through her vendee Courtney. She has permitted her husband, with her knowledge and consent, to use this money for his own purposes and to announce to his creditors and customers by his public advertisements and in the sale of his goods that he was the owner of the establishment; and her vendee knew all these facts when he purchased, and in fact purchased from the husband, and not the wife, as the proof clearly conduces to show. If the wife desired to trade as a *feme sole*, she should have resorted to a court of equity, as provided by the statute, or if she desired to invest her separate

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estate in merchandise and carry on this store, it should have been done in her own name, and then no creditor could have complained. The judgment of the court below is affirmed.

Caldwell & Harwood, Bullock, Davis, for appellant.

Z. Wheat, Lindsay, for appellee.

JOHN W. BROWN, ETC., v. GOODRIDGE'S EXECUTOR.

Judgments—Clerical Misprision—How Corrected.

A clerical misprision cannot be made available in the Court of Appeals until the circuit court upon proper application refuses to correct it.

APPEAL FROM HENRY CIRCUIT COURT.

September 6, 1871.

OPINION BY JUDGE LINDSAY:

The demurrer was sustained to the original petition because the executors of F. H. Goodridge were not made parties plaintiff. The amended petition made them parties and cured this defect, and the petition as amended set out a cause of action.

The appellants can not complain in this court on account of judgment having been rendered at the same time at which the amendment was made.

They did not ask for a continuance because of surprise. Nor does their answer disclose any ground of defense to the portion of the note for which judgment was rendered. If, as insisted by counsel, it was improper to render judgment at the same term at which the petition was amended (a question we do not decide) the error was merely a clerical misprision and can not be made available in this court, until the circuit court, upon proper application, refuses to correct it. *Civil Code, Sec. 580.* Judge Pryor did not sit in this case.

Judgment affirmed.

Webb & Barber, for appellant.

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B. F. BIGGS *v.* M. O. ROBINSON.

Receivers—Garnishee in Another Court—Duty.

A receiver, although summoned as a garnishee in a suit pending in another county, is compelled to obey the orders of the court in which he was acting as such. A receiver can not be made responsible for money paid out by him under the orders of the court, although wrongfully paid.

Courts—Conflicting Jurisdiction.

Where a court has taken jurisdiction over property by the appointment of a receiver, no other court has the power to annul or modify the orders of that court or make that court responsible for money ordered to be paid out by its receiver, although wrongfully paid.

APPEAL FROM TAYLOR CIRCUIT COURT.

October 17, 1871.

OPINION BY JUDGE PRYOR:

The money paid over under the order of court by the appellant, as shown by the record, was a fund under the control of the Green circuit court. The property was sold under a judgment of that court, and the suit in which the judgment was obtained was instituted prior to the suit in the Taylor circuit court. The receiver, although summoned as a garnishee in the suit pending in Taylor, was compelled to obey the order of the court in which he was acting as such. The fund was rightfully in the custody of that court, and the appellant had no control whatever in directing its payment. In addition to all of this, the record shows that the appellant, before the money was paid over, reported the fact to the court that he had been summoned as garnishee in the suit pending in Taylor, and the appellee on the same day filed a petition to be made a party in the Green court to the suit there pending, claiming the fund directed to be paid over. The court refused to make the appellee a party to this action, and upon this refusal, if improper, the appellee should have appealed. It was the Green circuit court paying this money under the order alluded to, and the Taylor court had no power to annul or modify the orders of that court, or to make that court responsible for paying this money over, even if wrongfully

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paid. The judgment against the appellant is erroneous. The cause is, therefore, reversed and the same remanded for further proceedings in conformity with this opinion.

Chelf, for appellant.

Montague & Robinson, for appellees.

JOHN A. COBURN v. SAMUEL M. WHIRNER.

Nuisance—Public—Action for Cannot be Maintained by Private Individual.

If a man close up a public highway, whereby it is stopped up to the use of the public, it is a nuisance, common to all, for which he may be prosecuted by the commonwealth, but a suit against him cannot be maintained by a private individual.

Roads and Passways—Prescription—Title by.

The right to a private passway may be acquired by continual user for 15 years under claim of right.

APPEAL FROM MASON CIRCUIT COURT.

February 15, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The passway claimed by appellee seems at one time to have been an alley or one of the public ways of the town of Germantown. If the deed from the trustees to appellant was void, then he was guilty of the commission of a public nuisance, for which he might have been proceeded against by a public prosecution, but for which no action would lie in favor of a private individual.

If a man close up a public highway, whereby it is stopped up to the use of the passengers, it is a nuisance common to all, for which he may be prosecuted by the Commonwealth, and punished, but a suit against him cannot be maintained by a private individual who has only sustained the injury common to all of being turned out of the way.

Assuming it to be true that the deed from the trustees did not pass the title to appellant, he had no right to erect and keep the gate, put up by him immediately after his alleged purchase. The passway still remained a public highway, notwithstanding the gates, and when they were taken down and the passway closed up by a fence, a public nuisance was committed for which a private individual cannot maintain an action. *Barr & Yeiser v.*

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Stevens, 1st Bibb 292. Instruction No. 1, given upon motion of appellee, conflicts with this view of the law and was erroneous and misleading. There is some testimony in the record tending to show that those under whom appellee holds, were about to resist the discontinuance of the alley in question, notwithstanding the deed from the trustees, and that to avoid litigation, appellant entered into some arrangement with them, whereby he secured the right of a private passway. If they entered upon the enjoyment of the passway under such an arrangement, and for fifteen years preceding the time when it was stopped up by appellant's fence, used it under a claim of right, then they acquired title thereto by prescription as against appellant, and might have recovered against him in this action upon such title.

But in view of the fact that this question was not submitted to the jury, and the right of recovery based upon the illegality of the deed from the trustees of Germantown, we are of opinion that the error was such as to require a reversal of the judgment.

The cause is remanded for a new trial consistent with this opinion.

Barbour & Cochran, Taylor & Gill, for appellant.

Phister, for appellee.

 FRANCIS BRONGER v. HOPE INSURANCE COMPANY.

Insurance—Contract—Assessment—Notice—Penalty.

Actual notice of assessment was all that the charter required and if appellant neglected to pay the same, he must be regarded as electing to suspend his right to collect his policy of insurance. Such suspension was an essential part of the contract.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 16, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The testimony of Bly, the witness of the appellant, shows that certain assessments were made against him which remained unpaid at the time of the loss of the property insured. There is no evidence showing that such assessments were illegal or irregular.

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The evidence shows that notice of these assessments was sent to appellant through the post office, and his own admissions lead to the conclusion that such notice was received by him. As held in the case of *Muhoff vs. Hope Insurance Co.*, actual notice of a legal assessment was all that the charter required, and if appellant neglected for thirty days after such actual notice to pay the same, he must be regarded as electing to suspend his right to collect his policy of insurance in case of loss. And further that the suspension of the policy holder's right to collect the amount of his loss in case it should occur during the time of such default, is not in the nature of a penalty. The charter makes such suspension an essential part of the contract, and the insurer cannot be heard to complain, that the company insists upon the enforcement of such condition.

Judgment affirmed.

Gazlay Yeaman, & Reinecke, for appellant.

Wilson, for appellee.

ISAAC CHANDLER v. HENRY CHANDLER, ETC.

Vendor and Purchaser—Small Deficit.

The deficit of one-half or three-quarters of an acre, in a tract of twenty-five acres, sold at \$2.00 per acre is too small a matter to authorize a reversal as it might have resulted from the smallest mistake in the work, or of a variation in the instruments.

APPEAL FROM JOHNSON CIRCUIT COURT.

February 15, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

Isaac Chandler who stands on the record as appellant, having been adjudged as the record shows a bankrupt, has no direct interest in the case, and his assignee has neither sought to be nor has he been made a party to this controversy. But if he had, as appellee was seeking to enforce a specific lien on land which he had sold and for which appellant was indebted, and the judgment is merely for an enforcement of the lien, and it is not suggested that the assignee could have made any other de-

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fense than that which was made by appellant, it does not appear how either of them has been prejudiced by the judgment.

The deficit of one-half or three-quarters of an acre in a tract of 25 acres sold at \$2 per acre is too small a matter to authorize an interference by this court as it might have resulted from the smallest mistake in the work, or of a variation in the instruments. Even regarding the case as properly before us by appeal, no error is perceived for which a reversal could be had. Wherefore the judgment is affirmed.

Roe, for appellant.

Brown, for appellees.

H. E. HENNING *v.* J. H. HENNING, ETC.

Vendor and Purchaser—Pleading—Deed—Warranty—Insolvency—Non-Residence.

Appellant neither alleges nor proves that his acceptance of the deed and warranty was induced by fraud, nor that insolvency or non-residence rendered the covenant of warranty unavailable, nor that any breach of the warranty had occurred by eviction.

Held: That appellant was entitled to no relief, unless upon the grounds of fraud superinducing the contract.

APPEAL FROM DAVIESS CIRCUIT COURT.

February 17, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellant neither alleged nor proved that his acceptance of the deed and warranty of J. E. Henning was induced by fraud, nor that his insolvency or non-residence rendered the covenant of warranty unavailable. Nor was it alleged or proved that any breach of the warranty had occurred by the eviction, or even the disturbance of the appellant in the possession of the land. It is plain, therefore, that he was entitled to no relief, unless upon the ground of fraud superinducing the contract.

Certain misrepresentations are alleged in the answers and cross-petitions, as made by the appellee when negotiating the sale, which allegations do not seem to be sustained by the proof further than to show that the appellee professed to be able to

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convey a good title, when in fact there was an encumbrance of his mother's life estate on the land; but it is not even claimed by the appellant that he was thereby deceived, misled, or seduced into the contract and the acceptance of the deed; and according to well settled principles, we are satisfied, that neither the allegations of the appellant nor proof relied on to establish fraud, is sufficient to authorize any relief on his cross-petition.

Wherefore the judgment is affirmed.

Sweeney, Stuart, for appellant.

Ray, Little, for appellees.

CHAS. CECIL v. J. M. GARDNER.

Bonds—Proceedings On By Motion.

If the proceeding by motion was erroneous the appearance to the motion and making same defense that could have been made in a suit on the bond was a waiver.

APPEAL FROM HARDIN CIRCUIT COURT.

February 22, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

If the proceeding by motion to recover of the appellant was erroneous (which we do not decide) the appearance of the appellant to the motion and upon the hearing making the same defense that could have been made in a suit upon the bond without interposing any objection whatever, until judgment was rendered against him is a waiver of all the objections that he is now making for the first time in this court. There is no proof of either fraud or mistake in the execution of the bond. The judgment of the court below is affirmed.

Wilson, for appellant.

Marriott, for appellee.

JOHN FENTRESS v. JAS. B. HOLMES.

Wills—Construction—Devisee Must Accept Will as an Entirety.

The devisees could not claim the estate devised to them in the balance of the tract and deny the right of the testator to dispose of

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the rest and thereby defeat the interests therein intended to be secured to their children.

APPEAL FROM GRAYSON CIRCUIT COURT.

February 23, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The devise to Dulcena B. and Josephine B. Tunstall and their children vested the first takers with life estates in the tract of land devised with remainder over to such children as might thereafter be born to them.

At the time of the death of Josephine, she had but one child, the present appellee. The title to one-half of the tract of land passed to him upon his mother's death, and his right of entry at once accrued.

We are not satisfied from the evidence that the mother of appellee ever accepted the deed to sixty acres of the land, made and executed by her father several years before his death.

She seems to have been aware that such deed had been executed but there is no single fact proved tending to show that she ever claimed any right under it, or in any way failed to recognize her father's title. Besides this, she accepted the estate devised to her, with the conditions imposed upon it. The testator claimed the right to dispose of the entire tract, and then doubtless recognized his right to convey such title as they could have taken under the deed to the 60 acres, with life estates, with remainder to their children. They could not claim the estates devised to them in the balance of the tract, and deny the right of the testator to dispose of the 60 acres in question, and thereby defeat the interests therein intended to be secured to their children.

We do not deem it necessary to discuss the other questions raised in the arguments presented by counsel, as the judgment of the circuit court must necessarily be affirmed for the reasons already given.

Wintersmith, Conklin, for appellant.

Cofer, for appellee.

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A. D. GEOGHEGAN *v.* MICHAEL MILLER'S ADMR.**Judgment—Set-off.**

No matter of set-off can be applied to a judgment previously rendered and in full force.

Pleadings—Prayer—Equitable Set-off.

The facts alleged did not authorize any relief and if they did the conditional prayer was insufficient.

February 23, 1872.

APPEAL FROM MEADE CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PETERS:

The judgment on the note for three hundred and ninety-two dollars had been rendered just one year before any answer was filed, and no matter of off set could apply to a judgment previously rendered and in full force.

Nor was the prayer for an equitable set-off and an injunction sufficient. The language is that if plaintiff shall refuse to accept the \$40 tendered then defendant prays the judgment herein may be enjoined, until the matters herein can be determined.

The facts alleged did not authorize any relief, and if they did the conditional prayer was insufficient.

Judgment affirmed.

Cofer, for appellant.

Marriott, Walker, for appellee.

E. F. ABBOTT, ETC., *v.* CITY OF NEWPORT.**Appeals and Errors—Court of Appeals—Power Over Former Decisions.**

The Court of Appeals has no power over its former decisions. Whether right or wrong that court as well as the circuit court is bound to recognize it as the law of the case.

February 21, 1872.

APPEAL FROM CAMPBELL CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PRYOR:

Although the mandate of the court did not in terms direct the judge of the circuit court upon the return of the cause to dis-

Opinion of the Court.

miss the petition of the appellants, yet when the reasoning and conclusions of this court as set out in the opinion, are considered, the further proceedings directed to be had, mean nothing more than the entry upon the record of the mandate, and the dismissal of such petition.

The amended petition offered to be filed is in no sense a bill of review. It presents no new fact arising or discovered since the first hearing of the cause. The object was to raise a question of law which might have been presented, and acted upon when the cause was first heard, or as appellants express it, to present fully and clearly a legal question attempted to be raised in the original pleadings.

It is not necessary that we should express an opinion upon this legal proposition. We have not the power to revise our former decision. Whether it be right or wrong, this court as well as the circuit court, is bound to recognize it as the law of this case.

Inasmuch as the circuit court had no discretion in the matter, but was bound to enter and obey the mandate of this court, it was not erroneous to refuse to transfer the cause to the chancery court.

Judgment affirmed.

Hallam, for appellants.

Hawkins & Boden, for appellee.

WM. A. CRIDER *v.* PETER SMITH.

Appeals and Errors—Amendments on Reversal.

On the return of the case from the Court of Appeals, the court below has the same power to permit amended pleadings to be filed, that it had before the reversal of the judgment.

February 22, 1872.

APPEAL FROM OLDHAM CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PRYOR:

It was not proper for this court to suggest that amended pleadings might be filed in the case, as the only defense set up

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was a want of consideration for the note sued on by Wm. A. Crider and this defense was held not to be good. On the return of the case, however, the court below has the same power to permit amended pleadings to be filed, that it had before the reversal of the judgment. The petition for a modification of the opinion is overruled.

Rodman, DeHaven, for appellants.

Lee & Rodman, Carroll, for appellees.

CITY OF LOUISVILLE v. JOSEPH STEIN, ETC.

Municipal Corporation—Street Improvements—Action to Recover Against Property Owner—Ordinance Must be Plead.

In an action to recover price of street improvement against the owners of property fronting on the street, the ordinance under which the contract was made, and also copies from the journals of the two branches of the General Council, showing the proceedings of that body had upon the adoption of such ordinance, must be incorporated in the petition.

Same—Irregularity in Passing Ordinance—Exonerates Property Owner.

The journal being silent as to the suspension of the rule requiring the ordinance to lie over, the presumption is that no such action was taken. This irregularity is sufficient to exonerate a property owner from paying the assessment made against him.

Same—Liability of City for Improvements.

Where there is an irregularity in the adoption of a city ordinance for street improvement, the city is liable to the contractor for the price of the work, as a matter of law.

February 10, 1872.

APPEAL FROM LOUISVILLE CHANCERY COURT.

OPINION OF THE COURT BY JUDGE LINDSAY:

As it was necessary that the appellees Judah & Wibben should show that the requisitions of the charter touching the improvement of streets had been fully complied with by the principal authorities of the city of Louisville, before the court would have been warranted in enforcing their claims against the owners of property fronting on the street improved, they very properly made part of their petition in the way of exhibits, not only their

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contract, but the ordinance, under which the contract was made, and also copies from the journals of the two branches of the General Council showing the proceedings of that body had upon the adoption of such ordinance.

As their right to recover against the property owners depended upon the facts presented by their petition, this question could be as well tried and determined upon demurrer as upon hearing. We are of opinion that the chancellor did not err in sustaining the demurrer. Indulging in all reasonable presumptions in favor of the regularity of the action of the city legislature. There is nothing whatever in the record of the proceedings of the common council tending to show that the requisition of the charter requiring ordinances to be read on two different days was dispensed with by that branch of such legislature. It is manifest that it was finally acted on by the common council on the same day that it was received from the board of aldermen. The journal being silent as to the suspension of the rule requiring the ordinance to lie over, we must conclude that no such action was taken. This irregularity was sufficient to exonerate the property owners from paying the assessment made against them.

This being true the liability of the city to pay for the cost of the improvement followed as matter of law. If the proceedings of the General Council as exhibited by appellees was incomplete, the city might have set up this fact by way of answer to the claim asserted against it by the amended petition. The city failing to answer, the facts presented by the record clearly entitle the appellees to the judgment rendered in their favor.

Judgment affirmed.

Fox, for appellant.

Elliott, Russell, for appellees.

Opinion of the Court.

WM. CALLOWAY, ETC., v. WM. HERRIN, ETC.

Execution—Sale of Land—Purchaser's Bond—Money Paid to Sheriff Also.

If the \$400.00 was paid to the sheriff as alleged, he received it without right and became liable to refund it; but that did not create any liability of the sheriff to the plaintiff who has his sale bond for all he was entitled to.

February 27, 1872.

APPEAL FROM FULTON CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE HARDIN :

Whether under any circumstances the sheriff was authorized to receive any part of the price of the land in money from the purchaser, when the law made it his duty to make the sale on credit and take the purchaser's bond, as it is alleged in the petition that the sheriff took the money for the full amount of the price of the land, we cannot see how the plaintiff, who is presumed to have collected the bond, could be also entitled to the \$400 alleged to have been paid to the sheriff. If the \$400 were paid to the sheriff as alleged he received it without right and became liable to refund it; but that did not, in our opinion, create any liability of the sheriff to the plaintiff, who had his sale bond for all he was entitled to.

Wherefore the judgment sustaining the demurrer to the petition is affirmed.

Webb & Barbour, for appellants.

Opinion of the Court.

E. G. HALL, ETC., *v.* F. A. SUMMERS, ETC.

Infants—Proceedings to Sell Real Estate—Value of Real and Personal Estate—Annual Profit—Jurisdiction.

In proceedings by the statutory guardians of infants to sell their real estate—before a court shall have jurisdiction to sell, three commissioners must be appointed and must report under oath to the court the net value of the infants' real and personal estate, and the annual profits thereof, and whether the interest of the infant requires the sale to be made.

February 9, 1872.

APPEAL FROM LOUISVILLE CHANCERY COURT.

OPINION OF THE COURT BY JUDGE PETERS:

Sub-Section 1, Sec. 2, Art. 3, Chap. 86, 1 Vol. R. S., p. 305. That in proceedings by the statutory guardians of infants to sell their real estate—before a court shall have jurisdiction to sell such infant's real estate three commissioners must be appointed to report and must report under oath to the court the net value of the infants' real and personal estate, and the annual profits thereof, and whether the interest of the infant requires the sale to be made.

The three commissioners appointed by the court to report under oath the net value of the real and personal estate of the infants, and the annual profits thereof, were duly sworn before a competent officer that they would faithfully perform the duties imposed upon them by the order appointing them commissioners in said case to the best of their abilities—that oath was signed by them, and certified by a justice of the peace—and in the caption of their report they state that they make the same under oath, which report as appears in the record was made with unusual care and particularity, containing a statement of every fact required by the statute—and must be regarded as having been made under oath.

It also appears in the record that the report was produced in court by the commissioners and filed; no attestation to the signatures of the commissioners was necessary; the record itself contains the highest evidence of the proper authentication of the report, by showing that the commissioners came into court and filed their report.

Opinion of the Court.

The proceedings in this case are much more regular than are usual in such cases, and seem to be unexceptionable and free from error.

Wherefore, the judgment is *affirmed*.

Easten & Callaway, for appellants.

S. Russell, for appellees.

J. T. ASHURST, ETC., v. W. B. KERN'S ADMR.

Equity—Commissioner's Report—Agreement In.

The mere report of a commissioner of a verbal expression of a desire on the part of appellants could not have the effect of binding them as by an agreement of record unless the report distinctly showed the term of the agreement.

February 15, 1872.

APPEAL FROM SCOTT CIRCUIT COURT.

OPINION OF THE COURT BY CHIEF JUSTICE HARDIN :

After the dismissal of the cross petitions of Ware and Adams, nothing remained in the pleadings to authorize the judgment for their claims; and the judgment cannot be sustained unless the statement reported by the commissioner, Payne, that it was the desire of Ashurst & Brother that the property should be sold all together, should be construed as sufficiently importing an agreement by Ashurst & Brother that the court might render the judgment, not only for the debt of Kern's admr. and for a sale of the property, but also for particular sums as due their co-defendants, Ware and Adams.

If the mere report of a commissioner of a verbal expression of a desire on the part of the Ashursts could, under any circumstances, have the effect of binding them as by an agreement of record, we are of the opinion that the report should, at least, certainly and distinctly show the terms of the agreement intended to be so proved, for the information of the court, and from which it might clearly appear what judgment they meant to consent to; but so far from this, the report does not import any admission of indebtedness to either Ware or Adams in any amount.

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The judgment must, therefore, be reversed, but without costs as to Kern's admr., the error seeming to have resulted from defective preparation on the part of Ware and Adams alone.

Wherefore, the judgment is reversed (at the costs of Ware and Adams) and the cause remanded for further proceedings not inconsistent with this opinion.

Polk, for appellant.

Robinson, for appellee.

PETER CAMPBELL AND WIFE *v.* W. F. DUERSON, ETC.

Vendor and Purchaser—Deficit—Criterion of Recovery—Abatement.

In contracts for the sale of land, where a part of the tract sold is lost to the purchaser he is entitled to an abatement to be ascertained by reference to the price of the whole tract and by its relative value when compared with the balance of the tract.

February 13, 1872.

APPEAL FROM JEFFERSON CIRCUIT COURT. CHY. B.

OPINION OF THE COURT BY JUDGE PETERS:

By their deed bearing date the 24th day of July, 1869, appellants profess to convey to M. McDermott in trust for Catherine Campbell, wife of Peter Campbell, in consideration of \$4,000, part paid in hand and the residue in three annual payments for which notes were executed, a certain lot of ground in the city of Louisville, beginning at a point on the west side of Clay street 100 feet north of the northwest corner of Franklin and Clay streets, thence northwestwardly with the west line of Clay street (50) fifty feet, and extending back westwardly at right angles with Clay street (105) one hundred and five feet, being the same lot conveyed by Cassandra Ferguson to Sarah W. Ferguson. The deed contains a covenant of warranty of title.

The note for \$521, which matured the 24th day of July, 1870, and being for the installment first due, was assigned to Speed & Henning, who brought suit thereon. As a defense to the action

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appellants allege that they have only a part of 38 feet of ground in the lot when they contracted and paid for 50 feet front, make their answer a cross-petition against Duerson and wife and the trustee. And pray for an abatement from the price they allege they paid for 50 feet front, in the proportion that the 12 feet bears to the 50 feet, at the contract price.

There is no controversy as to the deficit, but the controversy is as to the criterion by which the loss to appellants of the 12 feet is to be estimated. By appellants it is contended that their value is to be ascertained and fixed by reference to the contract price of the whole lot, or that the value of the 12 feet is to be estimated in the proportion that they bear to the price paid for the whole 50 feet. And to that is to be added the possible, or estimated diminution of the value of the remaining 38 feet by reason of the loss of the 12 feet.

The court below abated \$360 from the contract price for the loss of the 12 feet, and appellants complain.

In contracts for the sale of lands the general rule seems to be that where a part of the tract sold is lost to the purchaser he will be entitled to an abatement, if the purchase money is not paid, or if it is all paid, then to a recovery for the value of the land lost, to be ascertained by reference to the price of the whole tract, as fixed by the original contract, and by its relative value, when compared with the balance of the tract at the time.

From the evidence it appears that on the 38 feet of the lot, which appellants have and about which there is no dispute, there are two commodious brick cottages, of six rooms each, and they give to the lot its principal value. The remaining 12 feet which they expected to get, and included in their deed, to them, are without any building of any kind. What is then their relative value, compared with the value of that portion of the lot on which the houses are located? Certainly they cannot be of equal value per foot. The witnesses say they are not, and the price of \$30 per foot fixed by the court seems to be as high as was authorized by the evidence, and does full justice to appellants.

We regard, therefore, the judgment as favorable to appellants as they were entitled to have it.

Let it be *affirmed*.

Lee & Rodman, for appellants.

Pirtle & Caruth, for appellees.

Opinion of the Court.

JAMES ADAMS v. JAMES R. BROWN, ETC.**Counties—Appropriation—Sheriff Custodian—Funds Paid Out on Orders.**

Where a sheriff holds the funds of a county and is the proper custodian of same, he has no right to pay them out except upon the order of the county court.

Same—Commissioner to Let Contract to Build Road—Duties.

It was the duty of the commissioner to let out the work, to receive it when completed but they had no power to order the sheriff to pay the contractor.

February 12, 1872.

APPEAL FROM CHRISTIAN CIRCUIT COURT.**OPINION OF THE COURT BY JUDGE LINDSAY:**

A careful consideration of the facts presented in this case satisfies us that the judgment of the court below ought not to be reversed.

Wallace, the sheriff, held the funds in his hands as the custodian of the county, and had no right to pay them out except upon the order of the county court.

The order of that court, made December 8, 1868, goes no further than to appropriate or set apart \$800 to pay the cost of the work to be done on the Sand Lick road. It does not direct the sheriff to pay that sum over to the commissioners, nor authorize him to pay it out upon their order. They had the right to let out the work to the best bidder, to receive it when completed, and were bound to report their action to the court by which they were appointed. Having done this it then devolved upon that tribunal to order the sheriff to pay over to the contractor such amount out of the funds theretofore appropriated as might be due him.

If the court's commissioners failed or refused to make the proper report, or the court to make the proper order, the appellants' right of action accrued against his debtor, the county of Christian, and not against the mere agent of such debtor.

If the amount of his claim had been ascertained and fixed, he might, by writ of mandamus, have compelled the justices of the county court to order the sheriff to pay him such amount.

Opinion of the Court.

Upon the other hand, if the commissioners had the right to control in the sheriff's hands the amount set apart for the improvement of the Sand Lick road, then they should have been treated as quasi public officers, and compelled by mandamus to make the necessary orders upon the sheriff to secure the payment of such amount as may have been due to the appellant. Certainly no judgment for money can be rendered against them.

It may be that the circuit court misled appellant by overruling the demurrer to his petition. This was not the result of any action upon the part of these appellees. They pointed out the defect of parties in their demurrer, and when it was overruled they excepted to the action of the court. Having given notice to appellant of this defect of parties, it would be manifestly unjust to burden them with the costs of a reversal of the judgment, to enable him to do what they all the while insisted he should have done. They are not responsible for the action of the circuit court, and did nothing to mislead appellant.

The judgment must be *affirmed*.

Landis & Clark, for appellant.

R. & Bro. and McP. & C., for appellee.

CHAS. BRYANT, ETC., v. W. T. OWEN, TRUSTEE, ETC.

Tenancy in Common—Devise to Husband and Wife—Survivorship.

Where any real estate is devised to husband and wife there is no mutual right to the entirety by survivorship between them; but they shall take as tenants in common, unless a right of survivorship is expressly provided for and the respective motties is subject to curtesy or dower.

February 20, 1872.

APPEAL FROM DAVIESS CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PETERS:

Sec. 14, Art. 4, Chap. 47, 2 S. R. S., p. 27, Provides that where any real estate, or slave is conveyed, or devised to husband and wife (unless a right of survivorship is expressly provided for),

 Opinion of the Court.

there shall be no mutual right to them entirely by survivorship between them; but they shall take as tenants in common, and the respective moities be subject to curtesy, or dower, with all other incidents to such a tenancy.

The conveyance to Bryant and wife was made in 1865, and contains no provision for the right of survivorship, consequently under that deed they took as tenants in common, and Charles Bryant's portion of the land was subject to the payment of his debts, and his deed to Stinnett and others was properly adjudged fraudulent as to appellee who was a prior creditor.

Wherefore, the judgment is *affirmed*.

G. W. Ray, for appellants.

Owen, for appellee.

 THOS. M. BURFORD'S ADMR. *v.* NAT. GAITHER, ETC.

Landlord and Tenant—Rent—Lien—Execution Against Tenant—Levied on Property on Premises—Sale—Duty of Sheriff to Satisfy Landlord's Lien.

Notwithstanding the landlord's lien the sheriff had the legal right to sell under the execution against the tenant, the property on the leased premises. Out of the proceeds of such sale he was bound to pay the landlord such rent as had already accrued.

Bond of Indemnity—Liability.

The sureties in the indemnifying bond did not undertake that the sheriff would pay to the landlord his rent and are therefore not responsible for his failure to do so.

APPEAL FROM MERCER CIRCUIT COURT.

February 20, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The act of February 16, 1858, amendatory of Art. 2, Chap. 56, R. S., provides: "That a landlord shall have an exclusive lien on the produce of the farm or premises rented, on the fixtures, on the household furniture and other personal property of the tenant, or under tenant, found upon the rented premises, after

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possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than four months." This act repeals Section 20, Art. 2, Chap. 56, in so far as that section limited the right of the landlord to demand from the officer taking property on the leased premises under execution, one year's rent in arrears. Extending such right to one year's rent whether due or to become due, provided that it has not been due for more than four months. Notwithstanding the landlord's lien, the sheriff had the legal right to seize and sell under the executions in his hands against the tenant Neil, the property on the leased premises. Out of the proceeds of such sale he was bound to pay to the landlord such rent as had already accrued, and had not been due more than four months. And also such as would become due thereafter. So that the amounts paid would not in all exceed one year's rent. It is not to be assumed that the bond of indemnity was executed by the appellees to induce the officer to disregard the rights of the landlord, or to violate the bond. They undertook to indemnify the sheriff against the damages he might sustain in consequence of the seizure or sale of the property, and to pay to any claimant thereof the damages he might sustain in consequence of such seizure and sale, and to warrant to the purchasers of such property such estate as might be sold.

Now, the landlord sustained no damage by reason of the seizure and sale of the property. This much the sheriff had the right to do notwithstanding his lien. The only damage he can complain of is that the sheriff failed to pay over to him such amount of the proceeds of the sale as he had the right under the amendment of February 16, 1858, to demand. The appellees did not undertake that the sheriff would do this, and are not responsible on their bond of indemnity for his failure to do so.

The landlord was bound to look to the sheriff and his official sureties for the amount he had the legal right to demand out of the proceeds of the property sold, and these appellees cannot be held responsible for the dereliction of duty on the part of the sheriff in this regard, unless they entered into some combination with him, or by some fraudulent arrangement induced him to violate his official trust to the damage of the appellants.

Opinion of the Court.

Nothing of this kind is alleged or proved. Upon the pleadings and proof in the case, the Court below properly dismissed appellant's petition.

Judgment *affirmed*.

Polk & Bro., for appellant.

Gaither, for appellees.

J. W. HARDY *v.* H. S. JAMES.

Assault and Battery—School-Teacher on Pupil.

The authority of a teacher to hold his pupil to a strict accountability in school for disorderly behavior did not justify him in assaulting and beating the pupil on the playground.

APPEAL FROM METCALFE CIRCUIT COURT.

February 26, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

If the court properly ruled the law of the case, we can see no sufficient reason for disturbing the verdict of the jury, as unreasonable or excessive. And we perceive no valid ground of objection to the action of the court, in either giving or refusing instructions.

The authority of the teacher to hold his pupil "to a strict accountability in school" for disorderly behavior, did not, in our opinion, justify him in assaulting and beating the pupil on the playground, merely because the latter differed in opinion or understanding with him, in regard to a trivial matter occurring in a play in which he seems to have taken part with his pupils on equal terms; such authority and right of correction so far as authorized by the common school law was fairly explained to the jury in the instruction No. 4, which was given at the instance of the defendant.

Wherefore, the judgment is *affirmed*.

Dehoney, for appellant.

Opinion of the Court.

J. W. BURTON v. SARAH F. WINGATE.

Attachment—Property in Hands of Agent—Notice of Sale—Change of Possession.

Property, in the hands of an agent who has no notice of sale made prior to the levy of the attachment, is subject to the attachment as possession did not follow the sale.

February 9, 1872.

APPEAL FROM LOUISVILLE CHANCERY COURT.

OPINION OF THE COURT BY JUDGE LINDSAY:

Mrs. Brent, who held the attached property as the agent of the debtor Stephen G. Burton, had received no notice of the alleged sale to the appellant up to the time the order of attachment was levied. It seems to us perfectly manifest that in point of fact no change of possession actual or constructive followed the sale. Wherefore; the court below correctly adjudged the piano subject to the attachment, and properly dismissed appellant's petition. The rule against appellant and his surety to pay the value of the attached property according to the terms of their bond has not yet been finally disposed of; hence the proceedings thereunder are not now subject to revision by this court.

The judgment dismissing appellant's petition is *affirmed*.

Russell, for appellant.

J. G. Moore, for appellee.

L. A. JONES v. MASON TALBOTT'S ADMR.

Vendor and Purchaser—Deficit—Criterion of Recovery—Statute of Limitation—Fraud and Mistake—Discovery.

Relief for fraud or mistake must be commenced by action within five years after the cause of action accrues and the cause of action is not deemed to have accrued until the discovery of fraud or mistake, provided it is brought within ten years after making of the contract.

Same.

The criterion of recovery for deficit in land sold is the proportionate price of the deficit to the original amount paid.

Opinion of the Court.

APPEAL FROM BOURBON CIRCUIT COURT.

February 17, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

There is no controversy about the deficit in the land, nor as to the quantity that Talbott represented, or affirmed in his deed the tract contained, and the only question is, is appellant's demand barred by time?

There is no evidence that Jones discovered the mistake in the quantity of land in the tract prior to June, 1866, when he was made a defendant to the cross-petition filed by Conway in the suit of Griffith against him, on one of the notes executed by Conway to Jones for an installment of the purchase money, which Jones had assigned to Griffith, and in that suit an abatement of \$300 was adjudged proper on account of the deficit which must operate as a total loss to Jones unless he can be remunerated to some extent in this proceeding.

In October, 1868, appellant presented his claim for remuneration for the deficit in the land in the case of *Mason Talbott's Admr. v. Mary Talbott, etc.*, in the Bourbon Circuit Court, where said suit was pending for the settlement and distribution of the estate of Mason Talbott who was the vendor of appellant, and who in the mean time had died. The case was referred to the Master, with directions to hear proof of parties which should be offered touching any claims against the estate of decedent after giving notice of the time and place of his sittings, and report such debts, with the evidence offered to sustain the same to the court.

The Master made his report of the facts very fully to the April term, 1869, of said court—and submitted it as a question of law whether Talbott's estate should be made responsible for the deficit, and if responsible, that the court should determine also the extent of the responsibility.

Jones excepted to the report because the Master refused to allow his claim, and Talbott's representative also excepted to it because the claim of Jones was not rejected, because (in the language of the exception) the same is barred by the statute of limitations. On final hearing the exceptions of Talbott's repre-

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sentative was sustained, and the court adjudged Jones' claim barred by the statute and he has appealed.

Placing the case in the most favorable light for Talbott, there was certainly a mistake as to the quantity, and that mistake may be corrected if the remedy was not lost by time. The relief for fraud, or mistake under *Sec. 2, Art. 3, Chap. 63, 2 Vol. R. S., p. 127*, must be commenced by action within five years after the *cause of action accrued*, and the *5th Sec. of the same art. and chap.* declares that the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake, provided it is brought within ten years after the making of the contract, etc. If there might otherwise have been laches on the part of appellant in the discovery of the mistake, Talbott's declaration in his deed that the tract contained six acres may have lulled Jones, and prevented him from entering upon an investigation to ascertain the true quantity, and for this declaration he was the less excusable because his own deed from Griffith informed him that the tract contained only 4A-3R-6.

This proceeding was instituted by appellant within less than five years after he discovered the mistake, and the demand we can not adjudge barred.

The criterion of recovery will be the proportionate price of one acre, three rods and thirty-four poles—at the rate of eleven hundred dollars for four acres, 3 rods and six poles, with interest thereon at the rate of 6 per cent. per annum, for one year after the date of the sale of the land by M. Talbott till paid, and the costs of this proceeding. But he is not entitled to recover any costs, or attorneys' fees expended in the suit of Griffith against Conway, as it was his duty to have settled the controversy when it was ascertained by survey that there was a deficiency in the tract.

Wherefore, the judgment is *reversed*, and the cause is remanded with directions for further proceedings, and a judgment consistent herewith.

Phister, Kennedy, for appellant.

Alexander & Turney, for appellee.

Opinion of the Court.

JULIUS DORN *v.* JAS. M. KELLER, ETC.**Wills—Construction—Contingent Remainder—Suit to Sell—Necessary Parties.**

Under the will if Mrs. Keller should leave children or issue surviving her, they should take the estate in fee.

Held, that this contingent depending on events which may or may not happen, the persons who may take such future interest, can not for the time being be ascertained on account of the non-happening of the events on which such interest depend.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 10, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

This case seems to have been prepared with great care, and the proceedings seem to be regular. Under the will of her grandfather, if Mrs. Keller should leave children, or issue surviving her, they would take an estate in fee. But this is contingent depending on events which may or not happen. And the persons who may take such future interest cannot for the time being be ascertained on account of the non-happening of the events on which such interest depends.

As therefore it cannot be known to whom this future contingent interest may fall, if the contingency ever happens, it cannot be necessary to make others parties to the suit without knowing that they will ever have an interest in the property.

Moreover the party taking the present interest in the estate is to some extent made by the statute to represent the future claimants, because the statute requires that it shall be alleged and proved to the satisfaction of the court that the interests of all the claimants, present and future, will be subserved by a sale.

By the 2d section of the Act of the 23d of August, 1862, under which this suit is prosecuted, it is contemplated that those having a present, or vested interest in the estate, shall be parties to suits authorized by said act—*Myers Supp.*, p. 427.

The Chancellor in this case has taken every precaution to protect the interests of all parties, and his judgment is *affirmed*.

Dorn, for appellant.

Bodley & Simrall, for appellees.

Opinion of the Court.

M. S. CRALLE V. JAMES MARSHALL, ETC.

Executors and Administrators—Support of Widow out of Estate.

An executor may make an agreement for the support of the widow and is entitled to credit on settlement, for the amount so paid.

APPEAL FROM HARDIN CIRCUIT COURT.

February 29, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

The exceptions to the commissioner's report filed by the appellees ought not to have been sustained except as to the small note of H. W. Cralle. The proof shows clearly that the obligors in the notes were insolvent, and to have instituted suit would only have burdened the estate with costs. Hawkins, the son-in-law of the Devisor Cralle, was supporting and maintaining the widow under an agreement with the executor. She doubtless preferred living with her daughter, and Hawkins was not willing, or able, by reason of his poverty and insolvency, to take care of his mother-in-law, without being paid the money by the executor to enable him to comply with his agreement. It was proper for the executor to pay it, although Hawkins was indebted to the estate. If he had refused to pay the money, the consequence would have been a separation of the mother from the daughter, and a payment of the money for her support to some one else. The settlement shows an indebtedness to the executor, and no judgment should have been rendered against him. It appears from the commissioner's report that the widow is dead, and the money or notes in the hands of the receiver may be sufficient to pay these appellees what is due them, or at least their pro rata portion after full and final settlement, etc. The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Cofer, for appellant.

Wilson, for appellees.

 Opinion of the Court.

JOHN FENNESSEY *v.* EDW. F. ABBOTT.**Vendor and Purchaser—Covenant of Seizin—Covenant—Warranty—Breach of Covenant.**

The deed contains two distinct covenants; the first a covenant of seizin and the other an ordinary covenant of general warranty.

Same—Eviction.

To constitute a breach of the covenant of general warranty there must be an eviction of the grantee by paramount title, but the covenant of seizin is broken at once if the title conveyed is not clear, free and unencumbered.

Same: Criterion of Recovery—Title Defective to Part of Property.

Where the title is perfect to one-half of the property conveyed and defective as to the other the criterion of recovery is one-half of the original consideration with interest.

Same—Rescission of Contract—Appropriate Action.

A rescission of the contract to sell land can not be had in an action at law. The remedy is by suit in equity.

APPEAL FROM KENTON CIRCUIT COURT.

February 12, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The claim setting out the covenants as to title contained in the deed from Fennessey to Abbott is in these words:

"To have and to hold the same to the said Abbott, his heirs and assigns forever the grantor, his heirs, executors and administrators hereby covenanting with the grantee, his heirs and assigns, that the title so conveyed is clear, free and unencumbered, *and* that he will warrant and defend the same against all legal claims whatsoever."

We are inclined to the opinion that this clause embraces two distinct covenants; the first a covenant of seizin, and the other an ordinary covenant of general warranty.

To constitute a breach of the latter there must be an eviction of the grantee by a paramount title, but the covenant of seizin was broken at once if the title conveyed was not "clear, free and unencumbered."

Appellee, in his petition, alleges that an undivided one-half of

Opinion of the Court.

the lot conveyed belongs to one Hattie Powell, and that the title thereto was not in the appellant at the time the conveyance was made.

If such be the case, the covenant of seizin was broken at once, and the appellee had the right to recover the actual damages sustained by reason of the defect in the title conveyed to him so far as the interest owned by Miss Powell is concerned.

To recover damages this action at law was instituted, and with the petition the appellee tendered a deed to appellant conveying the entire lot back to him.

Upon hearing, the circuit judge to whom the law and facts of the case were submitted rendered judgment against appellant for the sum of \$997, with interest from the date thereof. It appears from the face of the judgment that this amount comprised the original consideration paid for the entire lot (\$750) with interest, and the taxes paid on the lot by appellee while in his possession.

Appellee fixed as the measure of his damages the consideration paid for the lot with interest and the taxes paid on the property, and expenses incurred in stamping and recording the conveyances. The circuit judge did not err to his prejudice in accepting this as the criterion of recovery, but did err in adjudging to him in this action the entire purchase price, interest, expenses and taxes. His title being defective as to one-half of the property, and perfect as to the remainder, he should only recover damages for that portion to which his title is not "clear and unencumbered" in an action at law for a breach of the covenant of seizin. According to the standard of recovery fixed by him in his petition his judgment is for double as much as it should have been.

If he desires to rescind the contract of sale he must resort to his appropriate action in equity. A rescission can not be had in such a proceeding as this. The circuit court could not compel the appellant to accept the conveyance tendered him with appellee's petition, and did not attempt to do so. It does not appear that appellant did accept the tendered conveyance, and it may be possible that when the proper proceedings for a rescission of the contract are instituted that he will be able to show that he should not be compelled to refund the consideration in money.

Opinion of the Court.

For these reasons the judgment is reversed and the cause remanded for further proceedings consistent with the principles herein expressed.

R. Richardson, for appellant.

Benton, for appellee.

THOMAS ELDER, ETC., v. DANIEL PROCISE.**Improvements—Good Faith—Value—Enhancement—Rent.**

Appellee having made the improvements in good faith was entitled to be paid for them, just the amount the land was enhanced in value at the time the suit was brought, he being liable for rent beginning at the same time.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 29, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

There can be no question that Hiram Tucker took, under the will of his father, the fee in the land sued for subject to be defeated by his dying without issue, and upon the happening of that event the title to the 132 acres of land vested in his surviving brothers and sister.

But appellee, the vendee of Hiram Tucker, paid the full value of the land, and doubtless put the improvements on it in good faith, believing at the time that the land was his, he had the deed of his vendor with a covenant of general warranty. And having made the improvements in good faith appellee was entitled to be paid for them, just the amount the land was enhanced in value at the time the suit was brought, he being liable for rent beginning at the same time.

Appellants are to be charged with the value of the estate each received as heirs of Hiram Tucker, that value to be estimated at the time of his death, which is \$4,400 in all, but in estimating the value of that inheritance the value of the dower right of the widow of decedent should be deducted. Certainly their inheritance from their brother of the 51 acres and odd poles of land was the worth of each one's portion subject to the dower inter-

Opinion of the Court.

est of the widow of their brother therein—and they should not be charged more than the land they inherited was actually worth at the time—and its cash value to be ascertained by means of annuity tables, taking into consideration the age and health of the widow, and that should be deducted.

Appellants are not entitled to any allowance for the stable that was burned on the 132 acres of land—as it was not burned by any fault of appellee.

It does not appear from the report of the master that the improvements put on the land were charged to appellant at their original cost, or whether he estimated them at the time he made his report—but neither aspect presents the case according to the rights of the parties. Appellee is only entitled to be allowed for the improvements made by him just the amount they enhanced, or added to the value of the land at the time the suit was brought.

Wherefore the judgment is *reversed* and the cause is remanded with directions that further proceedings be had not inconsistent herewith. And it may be proper to add that the judgment for the sale of appellant's interests in the land is also reversed and the sale is set aside.

Jas. Harrison, for appellants.

Barnett, for appellee.

J. H. HINES v. W. A. HUMPHREYS AND OTHERS.**Executors and Administrators—Time to Settle—Interest.**

An administrator has two years in which to settle his accounts and during that period he has a right to retain the assets to pay debts and liabilities against the estate and is not liable to pay interest unless he has put the money at interest or has made profit on it.

APPEAL FROM McCRACKEN CIRCUIT COURT.

February 29, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

It is not directly charged in the petition that the intestate at her death owed no debts—nor is it alleged that there were not debts outstanding against the estate when letters of administration were granted on her estate to appellant.

 Opinion of the Court.

By *Sec. 24, Art. 2*, of the *R. S.*, 1 *Vol.*, p. 506, appellant had two years within which to settle his accounts, and during that period he had a right to retain the assets of his intestate to pay debts and meet liabilities that might have been outstanding against the estate he represents, and is not for that period liable to pay interest on the assets, unless he has put the money out at interest or has made profit on it.

And he is entitled to a commission for receiving and paying out the funds, or for his services as administrator; the sum allowed therefor is usually five per cent. on the amount collected and paid out—to be proportioned, however, by the amount of service rendered.

The judgment in this case was rendered for the whole amount alleged to have come to the hands of the administrator, with interest from the very day it is alleged he received it—giving him no time to select safe and solvent persons to loan it to and when the minor heirs had no statutory guardians—and making to him no allowance for his services. Such a judgment is not authorized—and this one must be reversed, and the cause is remanded with directions to permit appellant to file an answer if he shall offer to do so and for further proceedings consistent herewith.

J. B. Husbands, R. K. Williams, for appellant.

Marshall & Bloomfield, for appellees.

 THOS H. CRUTCHER V. THOS. KEITH, ETC.

Vendor and Purchaser—Exchange—Vendor's Lien—Bond for Conveyance.

The judgment complained of recites the fact that Webber, to whom the purchaser's money for the house and lot was due, had been paid by Keith, the appellee. It is but equitable that he should have the benefit of his security.

February 16, 1872.

APPEAL FROM DAVIESS CIRCUIT COURT.

March 1, 1872.

APPEAL FROM McCRACKEN COURT OF COMMON PLEAS.

APPEAL FROM GREEN CIRCUIT COURT.

March 2, 1872.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

B. H. Crutcher, one of the parties to whom the appellee Darr executed the bond for the conveyance of the house and lot in Owensboro, in his answer professes his willingness to execute the contract for the exchange, and that the money may be paid to relieve the house and lot from the incumbrance of the vendor's lien, so as to secure a good title.

The judgment complained of recites the fact that Webber, to whom the purchase money for the house and lot was due, had been paid by Keith, the appellee, and it is but equitable that he should have the benefit of his security, especially as no injury can result to appellants.

Wherefore the judgment is *affirmed*.

J. W. Kincheloe, T. E. Crutcher, for appellant.

Saxeney & Stuart, for appellees.

D. M. FLOURNOY v. FIELDS MORRIS, ETC.

Judgment—Court has no Power to Set Aside at Subsequent Term.

No appeal was prosecuted from the judgment, and it was not within the power of Circuit Court, at a subsequent term, to set it aside, nor to refuse to permit it to be enforced according to its spirit.

Judicial Sale—Proceeds Cannot be Diverted.

The proceeds of a judicial sale cannot be diverted from its adjudged destination.

Same—Failure of Purchaser to Give Bond.

The creditor and not the debtor is the party to except to report of sale on account of the failure of the purchaser to execute a sale bond.

APPEAL FROM McCracken Court of Common Pleas.

OPINION OF THE COURT BY JUDGE LINDSAY:

Mrs. Carrie Flournoy was before the court by service of process and had filed her answer asserting claim to the house and lot conveyed to her by her father, prior to the rendition of the judgment of May 6, 1868.

Opinion of the Court.

By that judgment it was determined that her right to the property in question was subordinate to that of her husband's creditors. The house and lot were decreed to be sold, and the proceeds of the sale, or so much thereof as might be necessary, applied to the payment of the debts due and owing from her husband to these appellees.

It is not necessary for us to determine whether or not the court erred in failing to set apart to her one thousand dollars, the value of the homestead the husband might have retained as against those appellees, in case he had not conveyed the property to his wife's father. No appeal was prosecuted from such judgment, and it was not within the power of the circuit court, at a subsequent term, to set it aside, nor to refuse to permit it to be enforced according to its spirit.

Appellants, therefore, were not prejudiced by the refusal of the circuit court to permit their supplemental petitions to be filed. Under the judgment of May 6, 1868, appellees were entitled to have their debts paid out of the proceeds of the sale of the house and lot, and as that judgment could not be vacated except for some one of the reasons or causes enumerated in section 579 of the Civil Code, neither could the proceeds arising from such sale, or any part thereof, be diverted from their adjudged destination, and applied to the use of one or both of these appellants.

There is no exception made to the commissioner's report because of the fact that the sale was made on a credit of six months instead of six and twelve months as directed by the judgment. This informality must therefore be regarded as having been waived.

The exception based upon the fact that the purchasers had not given bond was properly overruled. It was the appellees and not the appellants who were interested in this matter.

Judgment affirmed.

J. Campbell, for appellant.

Bigger & Moss, J. W. Hopkins, for appellees.

 Opinion of the Court.

LOUISA J. EDWARDS v. ROBERT CRADDOCK, ETC.

APPEAL FROM GREEN CIRCUIT COURT.

March 2, 1872.

Vendor and Purchaser—Suit on Purchase Money Note by Assignee—Petition—Necessary Allegation.

The appellee made his assignor a party to the suit to enforce a purchase money lien, but failed to allege that he had conveyed the land to his vendee or that he had title, and was able to convey the same, and no tender of a deed was made in the petition.

Same—Purchase by Executory Contract—Possession Under—Subsequent Levy of Execution Against Vendor—Purchase by Vendee.

The contract for the sale of the land was made before the execution issued against the vendor and after the vendee took possession of the land; Held, That all the vendee, in any event, could claim was that her money be refunded by giving her a credit with the amount.

Husband and Wife—Judgment Against Wife—Husband Necessary Party.

The husband must be a party to a suit before a judgment can be rendered against the wife.

OPINION OF THE COURT BY JUDGE PETERS:

This suit in equity was brought by appellee Craddock, assignee of D. W. Edwards, against appellant L. J. Edwards on two notes for two hundred and twenty-nine thirty-seven one-hundredth dollars each, which is alleged were executed by L. J. Edwards for part of the purchase price of a tract of land sold by said D. W. Edwards to her, and for which he executed to her his title bond, and Craddock sought to subject the land to the payment of said notes, alleging that there was a lien retained on the same to secure their payment. He made his assignor a defendant to the suit, but failed to allege that he had conveyed the land to his vendee, or that he had title, and was able to convey the same, and no tender of a deed was made in the petition.

The defendant, L. J. Edwards, answered, and admitted that she had purchased the land as alleged and that the notes sued on were executed for part of the purchase price, but she alleged that after she purchased the land from D. W. Edwards, and had taken possession thereof, an execution was placed in the hands of the sheriff of the county in which the land was situate, and was levied on it, that it was sold by virtue of said levy under said

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execution, and one Vaughn bought it, but as it did not bring two-thirds of its value, the equity of redemption was levied on and sold under said execution and she purchased under the last sale, and D. W. Edwards having failed to redeem the land, she paid to Vaughn, the first purchaser, the amount due him, and obtained the sheriff's deed, under which she claimed the land, exhibited the executions and deed, alleges that the consideration for the notes had failed, makes her answer a cross-petition against D. W. Edwards, her vendor, and Craddock, and prays for a judgment in bar of a recovery on said notes.

The answers to the cross-petition controvert the claim of appellant to the land under the sheriff's deed, deny that the land was subject to sale under the execution, and the defendants to said cross-petition allege that appellant had purchased by executory contract and had possession of said land before the executions issued, and that D. W. Edwards had no interest in the land and that appellant took nothing by her purchase under the sale and deed made by the sheriff; but say they are willing and offer to give her a credit for the amount she paid on the executions which were levied on the land, and D. W. Edwards alleges that he is able and willing to make to her a title to the land, and tenders to her a deed with covenant of warranty, and relinquishment of his wife's right to dower, and prays that the vendor's lien be enforced.

On hearing, the court below rendered a personal judgment against L. J. Edwards for the amount of the notes sued on, to be credited by \$116.10, the amount she paid the sheriff on the purchases made under his sale, with interest from the time of the payments, and from that judgment L. J. Edwards appealed, and Craddock and his assignor prosecute a cross-petition.

It is now insisted for appellant that she was at the date of the judgment a married woman, and no personal judgment could have been rendered against her—and further, that by her purchase under the sheriff's sale she acquired the title to the land, and thereby absolved herself from any obligation to pay the notes.

The contract for the sale of the land by D. W. Edwards to appellant was made nearly two years before the execution issued against Edwards, and after she took possession of the land under said contract, and even if she took anything under her purchase

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at the sheriff's sale all that she could in any event claim would be to have her money refunded by crediting her with the amount, no authority need be cited to sustain that position; that credit she got by the judgment.

But it does appear from the title bond executed to her by D. W. Edwards, and which appellee Craddock made part of his answer to the cross-petition, that she was then a married woman, and that being her condition then, without any allegation to the contrary, her coverture must be presumed to continue, consequently the personal judgment against her was erroneous.

Appellant's answer to the original petition admits that D. W. Edwards had title to the land when he contracted to sell it to her, and she claims to have acquired the title by the sheriff's deed, and she thereby at least impliedly admits that he had title to the land when she purchased—and in his answer to her cross-petition he professes a willingness to make title and tenders a deed—which, however, is not such as she was bound to accept, but the contract may be specifically enforced.

The judgment, however, must be reversed on the original appeal, for the reasons stated, with directions to permit appellee Craddock to amend his pleadings and make the husband of appellant a defendant to the suit, and permit additional pleadings by the defendants if they should desire to do so. The deed tendered by D. W. Edwards, as before observed, was not such as appellant was bound to accept; it is blank as to the month it was made, and does not appear to have been acknowledged till late in November of the year it was made, and as to the price for which the land was sold; the deed should set forth the consideration paid for the land, and for this defect and want of sufficient allegations in the pleadings the judgment must be affirmed on the cross-appeal.

But on the original appeal the judgment is reversed and the cause is remanded with directions for further proceedings not inconsistent herewith.

Chelf, for appellant.

James, Towles, for appellees.

Opinion of the Court.

THOS. M. BURFORD'S ADMR. *v.* NAT. GAITHER, &C.

APPEAL FROM MERCER CIRCUIT COURT.

March 4, 1872.

Landlord and Tenant—Lien for Rent—Seizure and Sale of Tenant's Property by Stranger.

The rights of a landlord whose lien is in full force, and who has not resorted to his legal remedies to enforce the collection of his rent, cannot be jeopardized by the seizure and sale of the tenant's property under execution.

OPINION OF THE COURT BY JUDGE LINDSAY:

In the case of *Watts v. Cook, etc.*, the landlord's lien had been perfected, by an actual levy of attachments and distress warrants before the execution creditors caused the sheriff to seize and sell the property.

The levy of these distress warrants and attachments took the property out of the possession of the tenant and placed it either actually or constructively in that of the officers who made the levies.

The sheriff could not possess himself of such property, so as to levy the executions in favor of Cook and Grief, without the commission of a trespass. Against the consequences of this trespass the execution creditors indemnified him, and the action was therefore correctly brought on the bond of indemnity.

In this case no attachment or distress warrant had been levied or even sued out.

Appellant's rights grew out of the laws relating to landlord and tenants, and not out of an actual levy under a writ issued from a court of competent jurisdiction. He must therefore assert his rights in the manner prescribed by such statutes.

In the case of *Watts* this court held that bonds of indemnity inure to the benefit of "all legal or equitable claimants whose rights might otherwise be jeopardized by the wrongful seizure or sale of property under execution."

The rights of a landlord whose lien is in full force, and who has not resorted to his legal remedies to enforce the collection of his rent, cannot be jeopardized by the seizure and sale of the tenant's property under execution, so long as the 20th section of Act 2, Chap. 56, R. S., remains in full force.

Opinion of the Court.

The opinion in this case is perfectly consistent with the doctrine announced in *II Bush*.

The petition for a rehearing must be overruled.

Polk & Bro., for appellant.

Gaither, for appellee.

S. A. HAGARTY, ETC., v. S. S. SCOTT, ETC.

APPEAL FROM BOONE CIRCUIT COURT.

March 4, 1872.

Pleadings—Cross-Petition—Prayer for Relief.

There is no prayer in the pleadings for a specific execution of the contract of purchase, but a prayer for a rescission; and this is all the relief that can be afforded.

OPINION OF THE COURT BY JUDGE PETERS:

A rehearing of this case is sought mainly on the ground that appellant Foster is greatly prejudiced by the judgment, and that the reasons why he is entitled to a reversal were overlooked in the opinion delivered by this court. And in the petition for a rehearing it is said that if he, Foster, had examined the county records when Hagarty made the deed to him he would have found that the latter had a deed from Dulaney, and he a deed from the sheriff, all regular in form, and nothing to excite his suspicion that all was not right, etc.

To ascertain the exact position of Foster in the controversy it is proper to look with some minuteness into the pleadings.

The suit was brought by Hagarty against Foster on the note for the last instalment owing by Foster to Hagarty for the land, and in his answer to that suit Foster says that when the title bond was made to him and the deed was executed by Hagarty, "he was doubtful in regard to the title, and as to whether there was not some dower interest in said property, and wishing to make such provision as would protect him in the purchase, and that he might hold so much of said purchase money as would protect him, did agree and so provide in the contract of pur-

Opinion of the Court.

chase that a sufficiency of the last payment should be retained by defendant to secure him in the title to said property, should any question arise in regard to the title being perfect, and he says and charges "that the title to said land is not perfect and there is danger of his being disturbed in his title to same," and after setting out the facts in relation to Mrs. Scott, he charges that "she has a potential right of dower in said land, that she claims it," and he then avers that the whole amount of the note sued on will not be more than sufficient to indemnify him against her claim.

He then makes his answer a cross-petition against Scott and wife for the purpose of compelling them to interplead and of having the title adjusted, and prays that Hagerty may be restrained from the collection of the note until Mrs. Scott's claim shall be settled.

Scott makes his first appearance in this case to answer Foster's cross-petition, and after setting forth the facts on which he bases his claim to the land, he in turn makes *his* answer a cross-petition against Hagarty and Foster, and Dulaney prays to have the various deeds set aside and for a restoration of the property to him on equitable terms.

Appellant Foster, in his answer to *Scott's cross-petition*, after denying generally any knowledge or information sufficient to form a belief as to how Hagarty derived title farther back than his deed from Dulaney, he says he had made valuable and lasting improvements on the property, and if, on investigation, it should turn out that it was not Hagarty's when he purchased it, and the property should be recovered by a superior claim, then he prays judgment against Hagarty for the amount paid him with interest, and for the value of the improvements made by him.

There is not to be found in any of his pleadings a direct prayer for a specific execution of his contract, but a prayer in effect, if not in express terms, for a rescission if he can not get a perfect title, including a relinquishment of Mrs. Scott's potential right of dower. How can he get that? The law is powerless to secure it to him. The chancellor could allow him to retain out of the purchase money as much as would indemnify him against that claim, but he does not ask in his cross-petition for the relief; the only redress the chancellor can afford him is a cancella-

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tion of the contract, and that is what he seeks, as we have already seen, and that was granted him by the court below. It is difficult to perceive how he can complain of that judgment.

But if he had examined "the county records" what he would have found was that the sheriff, in consideration of the sum of \$215.91, the amount bid at two sales of the property made by him by virtue of two executions in his hands against Scott, he had conveyed the property to Dulaney, for which he was willing to pay three thousand dollars, and he would have further found that Hagarty, his immediate vendor, had paid only one thousand dollars, and aver as he did that *he could "not get a perfect title to the same."*

As between Hagarty and Foster there is no judgment which we can review, nor are we asked to do so, and still deeming the judgment of the court below correct, and finding nothing in the opinion heretofore delivered inconsistent with the settled principles of equity, we are constrained to overrule the petition for a rehearing.

Drane, for appellants.

O'Hara, for appellees.

J. B. JAMESON v. B. F. JAMESON'S ADMR.

March 14, 1872.

APPEAL FROM EDMONSON CIRCUIT COURT.

Homestead—Act Exempting Homestead—Prior Debts.

A homestead is not exempt from execution for debts created prior to June, 1866.

Same—Prior Lien On Land Other than the Homestead Created by Levy of Execution.

Where prior liens on land outside of the homestead have been created by levy of execution, there is no equitable principle by which these liens in favor of subsequent creditors can be made subordinate to antecedent debts.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PRYOR:

The executions in favor of Neeter, Otter & Son, and Lawlers, and the attachment in favor of Greer, were all levied on the two tracts of land in Edmonson County, one tract containing about ninety-eight acres and the other forty acres.

The appellant resided on the forty acres previous to the passage of the Act of June, 1866, exempting homestead from execution, and has so continued to reside since that time.

These prior liens on the land, outside of the homestead, were created by an actual levy of the executions and the attachment in favor of Greer and others, and although the debts due Jameson's Admr., Terry, Wheat & Co. and others were created previous to June, 1866, there is no equitable principle by which these liens created in favor of subsequent creditors are made subordinate to antecedent debts, when no liens prior in date exist, whilst the creditor with his debt in existence previous to the passage of the homestead law may subject it to the payment of his debt; then if a subsequent creditor levies his execution or attachment on land not a part of the homestead, his lien will be enforced for the reason that it is as much liable for the one debt as the other, and this court will not divest him of that lien in favor of the antecedent creditor who has no lien in order to protect the homestead.

These liens having been first created in favor of subsequent creditors upon land other than the homestead, it was proper first to sell this land to satisfy these debts, and the antecedent creditors (those existing prior to June, 1866) had a right to subject the homestead to the payment of their debts, for the reason that there was no other property out of which they could be satisfied.

The judgment of the court below must, therefore, be *affirmed*.

Smith, B. Lawlers, for appellant.

Opinion of the Court.

L. G. FAXON v. J. C. CALHOUN, ETC.

March 4, 1872.

APPEAL FROM McCracken Circuit Court.

Taxation—Land Sold for Railroad Tax—Purchaser's Lien.

The purchaser of land sold for railroad taxes has a perpetual lien on the property for the amount paid.

OPINION OF THE COURT BY JUDGE PETERS:

The right of a purchaser of real estate in McCracken County, sold to pay the railroad tax against the owners of such real estate, to recover the property purchased is not made to depend upon the return by the collector to the county clerk of the list showing the owner of the property, the name of the purchaser, the amount for which the real estate sold, and the newspaper containing the advertisement of the sale; these duties are directory to the collector.

And by the 7th section of the Act approved January 26, 1866, Sess. Acts 1865, C., page 170, a perpetual lien is given to the person paying the tax on the property, for the amount paid.

Wherefore, as it does not appear that appellant was prejudiced in any of his material rights, the judgment must be *affirmed*.

Bigger & Moss, for appellant.

JAMES A. CHAPPELL, ETC., v. EZEKIAL SUDDUTH, ETC.

APPEAL FROM NICHOLAS CIRCUIT COURT.

March 5, 1872.

Pleadings—Offer to File Amendment—Discretion of the Court—Not Prejudiced when Judgment would be Same.

A court does not abuse a sound discretion by rejecting an amended pleading where the judgment must be the same as if the amendment had been filed.

Ejectment—Action for Possession—Pleading Title Under Sheriff's Deed.

In order to recover under a sheriff's deed the petition must show the execution, levy and deed of the sheriff, also the judgment upon which the execution issued. The judgment and execution are the authority for selling and must be exhibited to show that the party's right has been regularly deduced from the original claimant.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

This was originally brought in the nature of an action in ejectment to recover the land from Ezekiel and John Sudduth. Ezekiel Sudduth in his answer merely denied he was wrongfully in possession of the land, and controverted appellant's right thereto. But John Sudduth not only controverted their right but set up and relied on an asserted equitable title prior and superior to theirs and asked to have the cause transferred to the equity docket, and made his answer a cross-petition and asked that his co-defendant should be compelled to surrender and convey the legal title to him.

Appellants in their original petition did not attempt to set out their title, nor did they by any amendment offer to do so before the cause was submitted on final hearing, but after that was done, and perhaps after the court below had intimated what his judgment would be appellants then offered an amended petition, and asked permission to file it, which was refused, and their petition was dismissed without prejudice, and they have appealed. It is insisted that the court below abused a sound discretion in refusing to permit the amendment to be filed.

To determine that question correctly it is proper to inquire whether appellants were prejudiced thereby, for if the judgment must have been the same even if the permission had been given, then appellants cannot complain.

As early as 1818 this court held that in making out title to land under a sale by a sheriff, not only the execution levy and deed of the sheriff but the judgment or judgments upon which the executions issued must be shown. The judgment and execution are the authority for selling, and must be exhibited to show that the party's right has been regularly deduced from the original claimant (*Dunn v. Meriwether*, 1 Mar. 158), and the question has been so decided in every case in which it arises from that time to the present.

The amendment tendered wholly failed to allege that there were any judgments to uphold the executions, and did not even make the sheriff's deed or a copy a party thereof, and if the court had sustained the motion to file it, the result must have been the same.

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The debt to Wm. Sudduth was a debt for which the land was sold under the decree of foreclosure, and a lien to secure it was expressly reserved in the commissioner's deed to E. Sudduth. Without deciding further on the merits of the main controversy the judgment must be *affirmed*.

Hargis, Ross, for appellants.

Phister, Andrews, Nowell, for appellees.

JAS. A. EDWARDS *v.* JNO. B. CARTER, ETC.

APPEAL FROM GRAVES COURT OF COMMON PLEAS.

March 7, 1872.

Guardian and Ward—Sale of Infants' land—Failure of Purchaser to Execute Bond.

If the money to which the appellant was entitled, was otherwise secured, the failure of the purchaser to execute bond does not affect the sale.

Same.

A sale of an infant's land cannot be impeached in a collateral proceeding.

OPINION OF THE COURT BY JUDGE LINDSAY:

Neither the judgment, nor the sale, deed, conveyance made pursuant thereto, in the proceeding by the statutory guardian of appellant for the sale of the land in controversy, were void. The facts set out in the petition gave the court jurisdiction. The necessary bond was executed to secure to the infants the proceeds of the sale of their lands. The report of the commissioners was in substantial conformity to the law. The failure of the purchaser to execute the bonds required to be given by the judgment did not necessarily render the sale invalid.

If the money to which appellant was entitled could be and was otherwise secured it is difficult to perceive any valid reason for attaching to the failure of the purchaser to execute those bonds the penalty of having his purchase treated as a nullity.

The conveyance executed in obedience to the order of the court was a sufficient confirmation of the sale.

Opinion of the Court.

We are not prepared to decide from the facts before us that because the land was purchased by the statutory guardian he held the title in trust for his ward, but even if such be the case, his vendees can not be compelled to surrender their possession in a proceeding like this.

The sale as before stated was not void, and it can not be impeached in a collateral proceeding.

Judgment *affirmed*.

L. Anderson, for appellant.

Williams, Tice & Miller, for appellees.

WRIGHT JUSTICE *v.* ELIZABERH MARTIN.

APPEAL FROM FLOYD CIRCUIT COURT.

March 7, 1872.

Vendor and Purchaser—Deed may be Construed to be a Mortgage—Consideration—Weight with Chancellor.

The inadequacy of the purchase price should have a controlling influence on the Chancellor in determining whether a deed, absolute on its face, was not intended by the parties to be a mortgage.

OPINION OF THE COURT BY JUDGE PRYOR:

The charge of fraud in the procurement of the deed from the appellant by the decedent Martin of the land in controversy is not sustained by the proof, nor can this court, looking to all the testimony in the cause, adjudge that the deed to Martin, although absolute on its face, was intended to operate as a mortgage. There is the evidence of two or three witnesses, if not in conflict with all the other testimony in the case, that might conduce to show that the appellant had the right to redeem this land upon the payment of the consideration expressed in the deed to Martin. These witnesses state that the land at the time of the conveyance was worth two thousand or twenty-five hundred dollars, and if so, it would have a controlling influence with the chancellor in the rendition of his judgment, but witness

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after witness introduced by the appellees, where intelligence connected with their knowledge of the value of this land entitles the judgment of each to great weight, state that the consideration paid was the full value of the land at the date of the deed. These witnesses are seven or eight in number, and some of them detail statements and conversations held with appellant in which he especially recognized the decedent Martin as the owner of the land. The fact of the appellant having retained the possession of a part of the land looking to the whole proof, instead of evidencing the title in him, was the result of the liberal and kind feeling of Martin toward him.

The fact that the deed recites upon its face the amount of the debts assumed and paid by Martin for the appellant is not a circumstance even indicating that it was intended as a mortgage. These debts constituted the real consideration for the land, and if it was intended as a mortgage it was certainly necessary that a claim should be inserted in the deed by which the appellant, at a particular time, should surrender possession of the premises.

The details of conversations held with parties, and particularly after they are dead, are very often easily established, but giving all testimony of the appellant its full weight, still the evidence of the appellees so greatly preponderates that there is but one conclusion to be arrived at from the facts proven, and that is that the conveyance to Martin was absolute and unconditional upon its face and was so intended by the parties at the time of its execution.

The judgment of the court below is, therefore, *affirmed*.

Jno. W. Hazelrigg, for appellant.

Brown, Apperson & Reid, Martin, for appellees.

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HOPKINS MASTODIN IRON, MINING & MANUFACTURING COAL COMPANY v. D. R. BURBANK.

APPEAL FROM HENDERSON CIRCUIT COURT.

March 7, 1872.

Process—Summons—How Executed on Company.

The officer's return is—"Executed by delivering to Joel Lambert a true copy of the within summons."

Held, that this is not such service on the company as is required by law.

OPINION OF THE COURT BY JUDGE PRYOR:

The judgment in this case, as originally rendered, if not void was certainly erroneous, and would have been reversed on an appeal to this court.

The execution of the summons upon Joel Lambert was no evidence that Joel Lambert was president of the company against whom this suit was instituted. The officer's return is, "Executed by delivering to Joel Lambert a true copy of the within summons," when the suit is against the Hopkins, Mastodin Coal Company, etc. This is not such a service of a summons upon the company as provided by law.

The appellants failing to answer the petition, a judgment by default was rendered against them, and in a few days thereafter, and during the term at which this judgment was given, the appellant moved to set aside the judgment in order that an answer might be filed in which they offer to plead payment. This plea is unfiled by Joel Lambert, who in reality was then president of the company.

When this motion was made by the appellant, the appellee proved by Joel Lambert that he was in fact president of the company, and this fact is made to appear in the bill of evidence, and no doubt caused the court to refuse the filing of the answer.

It seems to us that if the testimony offered and heard upon the motion to file the answer had the effect to cure the judgment already rendered, and which judgment was clearly erroneous, without evidence upon the record showing that Lambert was the president of the company, the court ought to have permitted the answer to be filed. This answer is unfiled by the witness, with

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the additional statement made by him under oath that this debt of the appellee had been fully paid by the company.

The appellee was in no condition to have sustained his judgment in this court, without the evidence heard upon the motion of the appellant to file the answer.

The judgment is reversed and the cause remanded with directions to permit the appellant to file the answer and for further proceedings consistent herewith.

James, for appellant.

Vance & Merritt, for appellee.

B. G. BRAYTON *v.* H. B. SPOONER.

Attachment—Suit on Attachment Bond—Evidence—Relevancy and Competency.

If the attachment levied on the goods had the effect to prevent a sale or to injure appellee in his business or to impair his credit, it was proper and legitimate for him to show these facts, but the mere opinion of the witness that the levy of the attachment worked this injury upon appellee, is incompetent. The witness must state facts such as that his customers have abandoned him, or his credit had been impaired by the merchants refusing to credit him, in order that the jury may form their own opinion.

APPEAL FROM CALLOWAY CIRCUIT COURT.

March 9, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

The counsel for the appellant made no exception to the instructions given by the court below, and, therefore, this court cannot consider them on the appeal. The only question presented in the case arises upon the testimony of the witness Scott. The appellant insists that much of this testimony was irrelevant and incompetent, and was prejudicial to his rights upon the question of damages. In this view of the case we must concur. If the attachment levied on the goods had the effect to prevent the sale of them, and also to injure the appellee in his business as a merchant by causing his customers to abandon him, or to

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impair his credit, it was proper and legitimate for the appellee to show these facts, but the mere opinion of a witness that the levy of an attachment works this injury upon the rights of the party whose property had been attached is clearly incompetent. The witness must state facts such as that his customers have abandoned him, or his credit has been impaired by the merchants refusing to credit him in order that the jury may form their opinion, if authorized from the proof that the witness himself expresses. Nor was it competent for the witness to speak of the speculative profits that in his opinion the appellee would have realized from the sale of the tobacco, or from the proposed formation of a partnership for the purpose of buying tobacco that might have been consummated but for the levy of the attachment. Although in an action like this, if malice is proven as well as the want of probable cause, the party suing is not confined in his recovery to the actual damages sustained; still mere speculative damages such as was attempted to be proven by Scott with reference to the tobacco are too remote, and the witness might as well conjecture that the partnership would lose money as that the adventure would result in profit. This testimony may have had an influence with the jury in estimating the damages, and at any rate we cannot say that it did not. There is also much of the testimony of Bloomfield, the attorney whose deposition was taken by the defendant that should have been excluded, and as the objections by plaintiff's counsel to this deposition were overruled we deem it proper to notice them. The opinion of the attorney that the suit was prosecuted in good faith was incompetent, as well as the conversations he detailed with the sheriff and the defendant after the issue of the attachment. What took place and was said at the time the suit was filed and the attachment obtained between the appellant and his attorney is incompetent for the appellant, as being part of the *res gestae*. Such statements, if they tend to show or illustrate the character and object of the main fact in issue and are made contemporaneous with it, are competent, but what was said afterwards by the party charged, or his attorney, is incompetent. Acts done by either afterwards may be proven, such as a release of the attachment or a surrender of the goods, but the reason given by the appellant for releasing the attachment, or surrendering the

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goods he cannot introduce as testimony, because it is not a part of the *res gestae*. 1*Greenleaf*, page 138. For the reasons indicated the judgment of the court below is reversed and cause remanded with directions to award to the appellant a new trial and for further proceedings consistent with this opinion.

Marshall & Bloomfield, for appellant.

Stubblefield, Bigger & Moss, for appellee.

GEO. W. HEADLEY AND OTHERS *v.* THOS. H. SIMMONS, ETC.

Infants—Sale of Real Estate for Reinvestment—If Sale Void Purchaser Entitled to Land Purchased with Proceeds.

Where an infant's real estate is sold for reinvestment and the proceeds reinvested in other lands, in the event the sale shall be adjudged to be void the purchaser of the infant's land is entitled to the property in which the proceeds has been invested.

APPEAL FROM LOGAN CIRCUIT COURT.

March 12, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

Mrs. Susan Williams and her husband both united with J. M. Morrow as guardian of their infant children in the original petition for the sale of the land in controversy.

The object in filing the petition was to enable them to sell the land and remove from this State to Missouri, where investments might be made of the proceeds of sale for the benefit of all concerned.

The commissioner sold the entire tract of land and the court below, as well as all the appellants, seemed to have regarded it as a sale of the interests of all the parties having any right or title under the deed to Mrs. Williams from her father.

When this land was sold the commissioner of the Logan circuit court, after appropriating a part of the purchase money in buying a wagon and other articles of property to enable the family to remove from Kentucky, proceeded to Missouri and made an investment of the money in a house and lot in the town of Car-

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rollton in that State. The deed to this property was made to Mrs. Williams and her children, the appellants, and held by them in the same manner as was the land sold in Kentucky; that is, "to Mrs. Williams for life, with the remainder to her children."

The commissioner was authorized to make the investment by the Logan circuit court, and all of his acts were directed and approved by that tribunal.

This original suit was filed in August, 1854. In March, 1865, the former guardian of the children, J. M. Morrow, filed a petition in the Logan circuit court alleging various defects in the proceeding of August, 1854, under which the land of Mrs. Williams and her children was sold, and by reason of various amendments to the act authorizing sales of infants' real estate asked to have the defects cured and the sale under the judgment of 1854 confirmed.

The court below adjudged that the infants having arrived at full age, the relation of guardian and ward ceased to exist between them and Morrow, and for that cause that petition was dismissed and the judgment, or order of dismissal, upon an appeal, was affirmed by this court on the same ground.

The sale under the judgment of 1854 was never canceled nor the purchaser disturbed in his possession; so far as this record shows, that judgment is in full force and unreversed at this time.

This court in the opinion rendered in the suit instituted in March, 1865, for the purpose of curing certain alleged errors in the suit of 1854, does say "that there were many fatal errors in that record," but did not disturb the judgment rendered in that case so as to affect the rights of the purchaser.

This court, as well as the court below, adjudged only that Morrow had no right to bring the action—the present suit in equity from which this appeal is taken is brought by the children of Mrs. Williams to recover the land upon the idea, that the sale under the judgment of 1854 was void, and that they have the immediate right to the possession of the property.

The mother of these appellants is still living, and we perceive nothing in all the records made part of the present suit by which she (or her vendees) has been divested of her life estate in this land. She never abandoned her right to the property, by giving

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it to her children or surrendering it to any one else, except in the manner as charged in the present petition. The only abandonment of her right to the land or its possession was the sale made in 1854, by which she obtained the means to enable her and the present appellants, who were then infants, to remove to Missouri and make investments of their monies in other lands.

This action on her part, instead of evidencing an abandonment, shows an evident intention to hold and assert her claim to her life estate in the land conveyed by her father. It was never intended by the grantor that a removal from the premises conveyed should work a forfeiture of his daughter's right, and such is not the meaning of the language used.

If we concede the right of the appellants to recover (which we do not now decide) the mother having a life estate in the land, the appellants would not be entitled to the possession until their mother's death.

The petition also fails to make to the appellee a tender of the money paid for the land, or to divest themselves of the title to the Missouri property by making the deed to the appellee, who certainly would be entitled to it, in the event the sale to him under the judgment of 1854 is adjudged to have passed no title.

The sale, if defective, is not void, but voidable as was decreed by this court in the case of *v. McGrath*, 1 Duvall, 349—if so, the appellants having been parties to the original suit for the sale of the land can prosecute their appeal, or obtain relief by a petition in the nature of a bill of review subject to the limitations and restrictions placed upon such proceedings.

The petition was defective, and the demurrer properly sustained.

The judgment is affirmed.

Bevier & Grubbs, for appellants.

Bowden, for appellees.

Opinion of the Court.

T. W. CAMPBELL *v.* F. SEIFFER.

Evidence—Competency of Conversation—Narrative of Past Occurrence.

A conversation which is not concomitant with the principal act nor connected with it so as to form a part of the *res gestae* but a mere narrative of past occurrences can not be received as proof of the occurrence.

APPEAL FROM WARREN CIRCUIT COURT.

March 12, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

The principal question presented by this record for determination is whether the conversation between appellee and Middleton as detailed by the witness Wilkins was competent.

The object of this testimony was twofold. First, to establish the fact that appellee had bought from Middleton his county claim and paid him for it. And second, that Middleton had not sold his claim to appellant, both of which were material to the issue.

As to the first it was evident that if appellee had purchased said claim it was done previously to that conversation, and it was not concomitant with the principal act of buying the claim, nor connected with it so as to form a part of the *res gestae*. But a mere narrative of a past occurrence could not be received as proof of the existence of the occurrence, 1 *Greenleaf on Evid.*, Sec. 110.

As to the second proposition the witness did not profess to have any personal knowledge whether Middleton had or not sold his county claim, but merely detailed what Middleton said on the subject, which was only hearsay and, therefore, incompetent. We perceive no error in giving or refusing instructions, but for the error in admitting incompetent evidence the judgment must be *reversed* and the *cause* remanded with directions for a new trial and for further proceedings consistent herewith.

Gorin, for appellant.

J. A. Mitchell, for appellee.

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H. C. HAMPTON v. J. C. MOSS.

**Bills and Notes—Assignment—Action by Assignee Against Assignor—
Sufficiency of Petition.**

In an action by an assignee against assignor the petition must allege that the obligor has been prosecuted to insolvency, when the execution was issued, the consideration paid for the note, that the assignor promised to be responsible if the maker proved insolvent, that the assignor represented to the assignee that the maker was solvent when the note was assigned.

APPEAL FROM WARREN COURT OF COMMON PLEAS.

March 13, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

By a very slight examination of the petition it will be seen that there is a total failure to state the facts necessary to show that the obligors of the note were prosecuted with proper diligence to legal insolvency.

It does not appear when they were sued, nor when the execution was issued against them; these dates so important to show due diligence are left blank. Besides, it appears from the petition that the note was sold and passed by delivery from Hampton to appellee, and he fails to allege what he gave for the note, or that Hampton assumed and promised to be responsible in case the makers of the note proved insolvent—to rebut the presumption that he was not liable by the sale and delivery of the note without an assignment of it. And he fails to aver that Hampton represented to him that Lowe & Hunt were solvent when he sold the note to him, and thereby induced him to take the note when he knew they were insolvent at the time.

In no view, therefore, in which the petition can be considered are the facts therein stated sufficient to constitute a cause of action against appellants.

Wherefore, the judgment is *reversed* and the cause remanded for a new trial and further proceedings consistent herewith.

Rodes & Clark, for appellant.

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J. R. GOINS *v.* E. P. HERNDON, ETC.

Pleadings—Verification of Petition by Infant.

Where infants are the real plaintiffs in an action and are old enough to understand the provisions of the Code, relative to the verification of pleading, they should be required to verify the petition.

APPEAL FROM WARREN CIRCUIT COURT.

March 13, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

Herndon and wife, although under 21 years of age, should have been required to verify the pleadings in this case. They were old enough to know whether they were entitled to recover the amount of their alleged claim against the appellant, and if they had been paid, or the amount in controversy had been previously settled and this fact was within their knowledge, there is no reason why they should not be compelled to state it—they are the real plaintiffs in the suit and old enough to understand the requirements of the code upon this subject when explained to them. If they were infants of tender years, and not old enough to understand the obligations of an oath, or the ordinary *business* affairs of life, the rule would be different.

The appellant was also entitled to a trial by jury; it was essentially an action at law and on his motion should have been transferred to the ordinary docket.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Dulaney, for appellant.

L. D. BARKER *v.* J. C. COMPTON.

Vendor and Purchaser—Suit to Enforce Purchase Money Lien—Necessary Allegations.

The judgment subjecting the real estate described in the petition was not authorized by the pleadings as there is no allegation in the petition that the appellant had any lien on the property.

As between the vendor and vendee no lien exists unless retained in the deed.

Opinion of the Court.

APPEAL FROM UNION CIRCUIT COURT.

March 14, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

The judgment subjecting the real estate described in the petition was not authorized by the pleadings. There is no allegation in the petition that the appellant had any lien whatever on the property even for the payment of his debt. The deed that he alleges was the consideration for the execution of the note is not made part of his petition, and no statement by him, express or implied, authorized the court to adjudge that there was a lien retained in the deed for the payment of the note sued on. As between the vendor and vendee no lien exists unless retained in the deed. The judgment of the court below is reversed and cause remanded with directions (the plaintiff being the purchaser) to set aside the sale and for further proceedings consistent with this opinion. The plaintiff ought to be allowed to amend his pleadings.

*Rodman, for appellant.**James, for appellee.*

JOHN BRACKETT v. G. M. ADAMS.

Bills and Notes—Action on Note—Note Must be Filed with Petition—Failure to File not Grounds of Demurrer—Remedy is by Rule.

In an action on a promissory note the writing should be referred to and filed with the petition but the failure to do so is not a ground of demurrer. But the appropriate remedy is by rule to compel the production of the note.

APPEAL FROM BELL CIRCUIT COURT.

March 15, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

The petition alleges, in effect, the execution and delivery to the plaintiff by the defendant of a promissory note for \$73.99, and that in that sum the defendant was indebted to the plaintiff.

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These averments, in our opinion, constituted a good cause of action, the facts alleged being admitted by the demurrer.

A note corresponding to that described in the petition is copied in the record; but it is not made a part of the petition, nor does the record show whether it was filed with the petition or not; but although the note should have been exhibited by a reference to it in the petition, showing it to have been filed with it, the omission was not a ground of demurrer, for notwithstanding it the petition stated facts constituting a cause of action. But the appropriate remedy of the defendant was a rule to compel the production of the note, or on failure to do so, or properly account for the non-production of the note, to dismiss the action.

The defendant having, however, relied alone on a general demurrer to the petition, we concur in the action of the court below in overruling it.

Wherefore the judgment is affirmed.

Farmer, for appellant.

Adams, for appellee.

JOHN L. CRUCH *v.* JOHN E. SMITH.**Pleading—Amendments—New Issues.**

The refusal of the court to permit new issues to be formed, amended pleadings was proper.

APPEAL FROM HARLAN CIRCUIT COURT.

March 19, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

The refusal of the Court to permit new issue to be formed, by amended pleading, and its reference of the case to a commissioner, were both proper under the decision of this court; and whether there was any irregularity or not in the confirmation of the report the judgment rendered, in abating the note by the value of the 100 acres of land, is as favorable to the appellant as the evidence would authorize or justify; and we perceive no substantial ground for reversing that judgment.

It is therefore affirmed.

L. Farner, for appellant.

Opinion of the Court.

THOS F. CHRANY v. MAREUS L. HICKS.

New Trial—Verdict Against Evidence.

This case is reversed on the sole grounds that the verdict of the jury ought not to have been sustained by the court.

APPEAL FROM HENDERSON CIRCUIT COURT, COMMON PLEAS DIV.

March 20, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

The instructions and ruling of the court, except on the motion for a new trial, seem to have been as favorable to the appellant as he had any right to ask or expect; but we must reverse the judgment on the sole ground that the verdict of the jury ought not to have been sustained by the court. As the case will be returned, we refrain from discussing the evidence or intimating any opinion whether the appellant should have recovered his whole claim for effecting or negotiating the trade with Rodman or a less amount; it will suffice to say that for that service we think it reasonably clear from the evidence that he was entitled to some compensation, which was denied to him by the verdict and judgment in this case.

Wherefore the judgment is reversed and the cause remanded for a new trial and proceedings not inconsistent with this opinion.

James, Eaves, for appellant.

D. R. BURBANK v. ELIZA J. OGDEN, ETC.**Principal and Agent—Speculation by Agent—Exchange of Currency.**

The appellant as agent of the appellee sold the tobacco in Europe and received in payment therefor, sterling exchange, and this was converted by him into the currency of this country, the exchange bringing a large premium.

Held, that the appellant should account to the appellee for the profits derived by him from the sale of the exchange. It was not his money or property but that of his principal, and any speculation indulged in by him in the way of exchanging this currency for greenbacks must be accounted for.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

March 20, 1872.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PRYOR:

The appellees, in their answer and set off, allege that the appellee Mrs. Ogden in the fall of 1862, and shortly after, delivered to the appellant twenty-two thousand and ninety-five pounds of tobacco under an agreement by which the appellant was to ship the tobacco to some European market, sell it, and apply the proceeds to the note in controversy, and also to the payment of a replevin bond due one McCormick, for about \$2,400.00, upon which the appellant was liable as the surety of the appellee.

The amount of moneys paid for the appellee by the appellant is undenied, and the only question presented in the case is as to the amount of money to be accounted for by the appellant derived by him from the sale of the tobacco.

The appellant sold the tobacco in Europe and received in payment therefor sterling exchange, and this was converted by him into the currency of this country, the exchange bringing a large premium.

The debt due on the replevin bond was paid by the appellant in greenbacks, or in the currency of this country, and there is no doubt but what the appellant should be made to account upon some equitable rule as between himself and the appellee for the profits derived by him from the sale of the exchange. It was not his money or property, but that of his principal, and any speculation indulged in by him in the way of exchanging this currency or paper for greenbacks must be accounted for.

On the 13th of February, 1863, the replevin bond was satisfied and discharged by the appellant by a bill of exchange drawn on his mercantile house in England, and for which he obtained greenbacks as appears from the depositions of the sheriff, Fred Rutlinger. Sterling exchange was worth less at that time than for a year afterwards, and the appellant having the right to apply the tobacco to the payment of his debt, and in fact *interested* in it to that extent by reason of his having advanced the money, should be made to account for the premium at that date, or so much of the sterling exchange as with the premium added would satisfy the debt.

The note to Mrs. Ogden matured to him in March, 1863, and he should be required to account for the premium at that date

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in the same way, on so much of the exchange as would satisfy that debt, the appellant under the agreement had the right to apply the tobacco to the payment of his debts and he should be made to account for the premium at the time he had the right to so apply it; this we think is the equity of the case. There is no doubt but what the appellant did so apply it, and this accounts for his failure to sell it for so long a time; this failure to sell, however, does not release him from responsibility for the marketable value of the tobacco within a reasonable time after it was delivered to him for sale.

There is some difficulty, however, in arriving at the amount of money for which the appellant should be held accountable. It was the duty of the appellant under the authority given him by the appellee to dispose of the tobacco in a reasonable time after its arrival in market.

There was nothing, so far as this record shows, to have prevented him from selling this tobacco in the fall of the year 1863, and the early part of the winter of 1864; he had no authority to hold on to the tobacco for higher prices; its marketable value during this period was an inducement in part for holders to dispose of their stock in this article.

The appellant should be made to account for the average value of such tobacco in the market in Europe, where this tobacco was sold for and during the fall and winter of 1863 and 1864.

The proof in regard to the value of the tobacco is so unsatisfactory that this court cannot well fix the price, and with a view of having a proper and equitable adjustment of the rights of the parties, the case is reversed on both the original and cross-appeal, with directions to the court below to permit parties to take additional proof, if they desire, only upon the value of the tobacco, within the periods indicated by this opinion.

The reversal of the case either on the original or cross-appeal is not to affect any judgment as to the amount hereafter to be rendered between the parties.

The original opinion having been lost or mislaid, this is directed to be entered as the judgment of this court and so certified. The petition for a rehearing is overruled.

Vance, for appellant.

Yeaman, Bush, for appellees.

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E. F. ABBOTT, ETC., v. CITY OF NEWPORT.

Appeals and Errors—Mandate—Former Opinion of the Case.

The Court of Appeals has not the power to revise its former decision, whether it be right or wrong. The Court of Appeals, as well as the Circuit Court, is bound to recognize it as the law of the case.

APPEAL FROM CAMPBELL CIRCUIT COURT.

February 21, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

Although the mandate of the court did not in terms direct the Judge of the Circuit Court upon the return of the cause to dismiss the petition of the appellants, yet when the reasoning and conclusions of this court, as set out in the opinion, are considered, the further proceedings directed to be had, mean nothing more than the entry upon the record of the mandate, and the dismissal of such petition.

The amended petition offered to be filed is in no sense a bill of review. It presents no new fact arising or discovered since the first hearing of the cause. The object was to raise a question of law which might have been prevented, and acted upon when the cause was first heard, or as appellants express it, to present fully and clearly a legal question attempted to be raised in the original pleadings.

It is not necessary that we should express an opinion upon this legal proposition. We have not the power to revise our former decision. Whether it be right or wrong, this court as well as the circuit court, is bound to recognize it as the law of this case.

Inasmuch as the circuit court had no discretion in the matter, but was bound to enter and obey the mandate of this court, it was not erroneous to refuse to transfer the cause to the chancery court.

Judgment affirmed.

Hallam, for appellants.

Hawkins & Boden, for appellee.

Opinion of the Court.

WM. BECKWITH v. JOEL LAMBERT.

New Trial—Discretion of the Court—Conflicting Evidence.

The evidence was somewhat conflicting, and although the verdict for this reason might not have been disturbed by this court, still the judge presiding at the trial is in a better condition to determine the motion for a new trial than this court.

Appeals and Errors—Insufficient Amount—Cost Exceeds the Amount of Error.

The only error is in the adjudged balance of \$29.00.

Held: That as the accumulated cost on each side must necessarily exceed the amount in controversy this court will not reverse.

APPEAL FROM HENDERSON CIRCUIT COURT.

March 22, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The court below did not abuse its discretion in awarding to appellant a new trial. The evidence was somewhat conflicting and although the verdict for this reason might not have been disturbed by this court, still the judge presiding at the trial, having the witnesses before him and watching the progress of the case, is in a better condition to determine the motion for a new trial than this court, and we are of the opinion that the new trial was properly granted. Most of the evidence introduced applies to matters connected with the contract between the parties, about which there is no controversy. The commissioner upon the testimony before him could not have reported adverse to the appellee, and the only error, if any, is in the adjudged balance of twenty-nine dollars.

This court, for this error (the existence of which there is some doubt) will not reverse the judgment as the accumulated costs on each side must necessarily exceed the amount in controversy.

The judgment is affirmed.

M. Yeaman, for appellant.

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EDWARD CUMMINS, ETC., v. WM. BRADFORD, ETC.

Descent and Distribution—Advancements—Parol Gift of Land—Failure to Make Conveyance—Improvements.

The intestate had placed several of his children in the possession of parcels of his land and gave them some personal property, intending that this property be held and owned by them and to be accounted for in the final disposition of his estate between all of his children.

He failed to execute any kind of writing evidencing the advancements in such a way as to pass title to the land.

Held: That the appellants refused to execute deeds in order to perfect the title to the real estate given by parol to some of the children, resulted in annulling these gifts and the parties in possession are called upon to account for the rents and to be credited by the permanent improvements made by them on the property.

Judgments—Interlocutory—No Appeal.

There is no appeal from an interlocutory judgment which does not direct the payment of money.

Husband and Wife—Title of Personal Property Belonging to Wife Vests in Husband.

The intestate's first marriage was long before 1846, and at the death of the wife she was the owner of certain slaves, in her own right, prior to 1846, which under the law belonged to the husband after their marriage.

Executors and Administrators—Suit to Settle Decedent's Estate—Cost.

Where an administrator brings suit to settle the decedent's estate all the cost should be paid out of the general estate.

APPEAL FROM PENDLETON CIRCUIT COURT.

March 23, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

John Bradford died in the county of Pendleton, leaving his wife surviving him, and also twelve children, three of whom were by his first wife. His wife Sarah administered upon his goods, etc., and filed a petition in equity in the circuit court of Pendleton county for the settlement of her husband's estate. The intestate at the time of his death owned a large tract of land but very little personal estate. He had made during his lifetime advancements of property, real and personal, to his children, and his administrator for the purpose of having a full and complete

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settlement of the estate, and an equitable division thereof, between the children, filed an amended petition, in which these advancements made are sought to be charged against them. The children of the last wife in various suits against the children by the first wife in which they claim large sums of money by way of rents for land, and hire of negroes, alleged to have been used, occupied and controlled by the children during the lifetime of the intestate, and afterwards, and for the use of which they have wholly failed to account. A suit was also instituted against Nicholas Bradford by these children (appellants) for the purpose of setting aside a deed made by his father to him for a tract of land, upon the alleged ground of his want of intellect at the date of the deed to execute such an instrument. These suits were all consolidated and in April, 1870, an interlocutory decree was rendered settling, to some extent, the rights of the parties, and the case referred to the commissioner for the purpose of making a final report and settlement between those interested in the estate. This interlocutory judgment was directly connected with, and made part of the judgment appealed from and we think, looking to the facts presented in the record, was prejudicial to the appellants. The intestate had placed several of his children in the possession of parcels of his land, and gave them some of his negroes, intending no doubt that this property should be held and owned by them and to be accounted for in the final disposition of his estate between all of his children. His aversion to some of what he conceived to be the odious and exacting laws of Congress prevented him from executing deeds to his children (as he or the donees would then be compelled to conform to those laws by stamping the deeds), or from any writing evidencing the advancements in such a way, as to pass title to the land. The appellants refuse to execute deeds in order to perfect the title to this real estate sold or given by parol to some of the children, and this refusal results in annulling these gifts or contracts and the parties in possession are called upon to account for rents to be credited by the permanent improvements made by them upon the property. The interlocutory decree rendered in April, 1870, was no doubt intended to settle finally the rights of the parties, as to rents and improvements accruing previous to the intestate's death, but the appellants

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could not have appealed from this judgment as there was no order or judgment directing the payment of the money and none could have been made, until it was finally ascertained how much each one of the children was entitled to, and in order to do this the interlocutory order was necessarily a part of the final judgment between the parties, and in the opinion of this court, the chancellor could have disregarded this interlocutory order altogether upon the final hearing, if authorized by the proof. There is certainly an error in the judgment of April, 1870, as well as the final judgment so far as the same applies to the rights of John R. Bradford. He is chargeable with the rent of the land occupied by him at the time of the filing of the report for two years at \$175 per year. He states that at the time he made the parol purchase of the land from his father the value of the improvements made by him was estimated at \$732; that since that time he has made other improvements valued at \$379, making the value of all his improvements \$1,111.11; from this is to be deducted the two years' rent and would leave him entitled to \$761.00 for his improvements when by the judgment of 1870 as well as the final judgment, he is allowed for these improvements \$1,695.00.

John R. Bradford entered upon the land in the year 1855 and remained there until his father's death. He occupied it for more than ten years before he made the parol purchase, and in the meantime erected upon the place valuable and lasting improvements. He enjoyed the full benefit of these improvements made out of his own means and labor, and it is very questionable whether or not a party ought to be allowed for improvements under such a state of case; in fact if the several answers filed in this controversy by the appellees to the various claims for rent against them had not admitted the relation of landlord and tenant, as well as an actual renting, this court would have adopted the statement made by the witness, L. J. Bradford, coming from the intestate himself, as the basis of the settlement between the children, viz.: "*that he the intestate did not intend to charge any rents,*" and this, from the long enjoyment of the land by the appellees would have excluded also, any compensation for improvements. The pleadings and admissions of the parties, however, present the case in a different view. The failure of

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the appellants to answer the cross petition of John Bradford as to the value of the improvements made by him and the alleged agreement between himself and his father not only as to their value, but that they should be accounted for, and had in fact been settled as charged in this cross petition by the parol sale of the land, entitle him to recover to that extent for his improvements. The testimony of his brothers conduces strongly to show that the rent had been accounted for annually in the division of the crops raised on the farm, and the agreement by the father to deduct from the purchase money of the land the value of these improvements, strengthens the justice of appellee's claim. If he had held this large claim for rent, against him no deduction would have been made for improvements. He is entitled, however, to only \$761 instead of \$1,695 for these improvements and in this estimate no rent is to be charged against him. The proof also tends strongly to show that the rents had been settled by the brothers. *William Ury, etc., v. Nicholas, etc.*, and the report and judgment thereon will not be disturbed. We are also of the opinion that the appellants should not be charged with any rent, owing or allowed for any improvements made prior to the death of their father. This is the only equitable mode in which this case as it is now presented can be disposed of.

The intestate's first marriage was long before the year 1846, and at the death of his wife she was the owner of certain slaves in her own right. This right to the negroes existed as is admitted by appellees prior to the year 1846, and if the wife was then the owner of the property or had vested interest therein the negroes under the law belonged to the husband, whether in the actual possession of the wife or not. The children claim, however, that the interest of the mother in these negroes was limited to an estate for life, with remainder to them under the will of some relative, and that, under this asserted claim by them, the father by the advice of a lawyer, compromised the matter by surrendering to them a part of the negroes. The proof of the declarations of the father upon the subject indicates, however, an intention, and a surrender of this property to the children, more because he had acquired a right to the negroes by reason of his marriage with their mother than by any recognition of a legal right on

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their part. In fact, they show no other right to the negroes than that derived from the father. If by the will of the mother's relative, they were vested with an interest, such as they now assert, the production of the paper would determine a controversy about which there now exists much doubt. The children obtaining these negroes must account for their value at the date of the advancements made, that is, at the time they received the possession from the father, and are not liable for either interest or hire on their value. We have carefully considered all the exceptions made by both parties to the report of the commissioner, and find no error to the prejudice of the appellants except as herein indicated. There is a large volume of testimony in the case, and in the absence of any brief by the appellants, it has been very difficult to investigate the questions presented on the exceptions. The appellees ought to be permitted to produce the will, if they can, evidencing a title to the negroes adverse to the father, if not, they must account for the negroes as advancements, etc. As this is a suit to settle all the rights of these parties instituted by the administrator, it is but right and proper that the costs of this controversy in this court as well as the court below should be paid out of the general estate. The judgment of the court below is reversed and the cause remanded with directions to refer the case to the commissioner to make a report upon the proof taken, on the basis as fixed by this opinion in order that a judgment may be rendered as herein indicated. The parties, however, may produce the written evidence of their title to the negroes adverse to their father, if they can do so.

Clarke, Ward, for appellants.

Ireland, Lee, Menzies & F., for appellee.

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J. I. EMERINE & WIFE v. W. H. ADAMS.

ChamPERTY and Maintenance.

The purchase of Adams was not champertous because Rachel Visage did not have actual possession of the two tracts of land at the time the conveyance was made.

Adverse Possession—Elder and Junior Patentees—Statute of Limitation.

There is no better established rule than that the junior patentee can not claim possession as against the elder to any greater extent than he may actually hold and the statute of limitation does not begin to run until actual occupancy.

APPEAL FROM LIVINGSTON COURT OF COMMON PLEAS.

March 25, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY.

The appellants do not insist that the instructions given by the common pleas judge upon the trial of this cause were calculated to prejudice their substantial rights, but rely for a reversal of his judgment upon the fact that the finding of the jury was palpably against the weight of the testimony.

A careful consideration of the evidence satisfies us that the two tracts, the one of 60 and the other of 50 acres, do not lie wholly within the boundaries of the conveyance from Lunder to Adams, but that a portion of each of said tracts is embraced within such boundaries is proved beyond cavil.

The modified judgment of November 26, 1870, recognizes these facts, and removes any ground of complaint which appellants may have had, on account of the judgment as originally entered.

The purchase of Adams was not champertous, Rachel Visage did not have actual possession of the two tracts of land in controversy at the time the conveyance was made.

The fact that she lived upon and held possession of her home farm of 200 acres, adjoining the land in controversy, did not extend her possession over the entries made within the boundaries of the lands patented to the Bullit Co.

There is no better established rule than that the junior patentee can not claim possession as against the elder, to any greater extent than he may actually hold.

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No actual entry was ever made by Emerine and wife or those under whom they claim, upon the lands covered by the junior patents until 1863, more than thirteen years after the conveyance from Lunder to Adams.

For the same reason the statute of limitation did not begin to run until the actual occupancy by Emerine and wife was begun.

From the facts proved it is a matter of serious doubt whether these appellants in good faith believed themselves to be the owners of the lands in contest or rather that they were not aware of the claim of Adams' heirs, for which reason even if the lost patent be not void, we would not be inclined to disturb the action of the judge of the common pleas court as to rents and improvements.

Feeling assured that appellants will be deprived of none of their rights by the enforcement of the judgment appealed from, we are constrained to affirm it.

Greer, for appellants.

Bush & Bush, for appellees.

F. HIGGENSON'S EXRS *v.* J. M. FITZHENRY ET AL.**Partnership—Acts of Insolvency.**

Fitzhenry, Liversay and Mitchell were partners in running a planing-mill. Fitzhenry and Liversay left the state, at which time the partnership property was insufficient to pay the partnership debt. Mitchell remaining in Kentucky executed a mortgage to his father for the purpose of securing a debt owing him by the firm. This mortgage was executed in the firm name and for the purpose of securing only firm liabilities.

Held: That as the proof shows that the partnership effects were not sufficient to pay the firm's debts, the only object Mitchell had in view in making the mortgage was to secure his father in preference to other creditors.

Partnership—Acts of Insolvency—Effect on Individual Estate.

An act by which a partnership is declared insolvent does not necessarily effect the individual estate of the partners and can be made to apply alone to the firm and not the individual members thereof.

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Partnership—Sale of Individual Property to Satisfy Firm Debt—Other Creditors Made Equal Out of Partnership Property.

There is no equitable principle by which appellee can assert his lien upon the individual estate of the partners and then claim benefit of the partnership effects. He must be content with what he has realized out of the individual property until the partnership creditors are made equal out of the partnership property.

APPEAL FROM UNION CIRCUIT COURT.

March 26, 1872.

OPINION OF THE COURT BY JUDGE PRYOR.

Fitzhenry, Liversay and Joseph C. Mitchell were partners under the firm name of J. M. Fitzhenry & Co., in running a planing mill located on a piece of ground leased to the firm by Mitchell, one of the partners.

There was a steam engine and machinery connected with this mill, all of which was partnership property. After the partnership had been in existence for some time, two of the partners, Fitzhenry and Liversay, left the state and joined the southern army. At the time they left, the partnership property was insufficient to pay the firm debts, and Joseph C. Mitchell, the partner, remaining in Kentucky, executed a mortgage to his father, Joseph Mitchell, Sr., for the purpose of securing him in the payment of several notes owing him by the firm, amounting to twelve or fifteen hundred dollars. This mortgage was executed in the firm name, and for the purpose of securing only firm liabilities and dated in January, 1862.

Joseph Mitchell, the father, assigned these notes to the appellee, Clements, who instituted his action thereon on the equity side of the docket, and obtained attachments against the two partners, Fitzhenry and Liversay, who had left the state and had them levied on their individual property. This property consisted of a house and lot owned by each one of them in Uniontown—the attachments were levied on the 21st of February, 1862. On the 27th of February, 1862, Wheeler & Son had an attachment issued, and levied on the dwelling house and lot owned by J. M. Fitzhenry, and also had the same levied on his, Fitzhenry's, interest in the partnership property.

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EDWARD CUMMINS, ETC., *v.* WM. BRADFORD, ETC.

Descent and Distribution—Advancements—Parol Gift of Land—Failure to Make Conveyance—Improvements.

The intestate had placed several of his children in the possession of parcels of his land and gave them some personal property, intending that this property be held and owned by them and to be accounted for in the final disposition of his estate between all of his children.

He failed to execute any kind of writing evidencing the advancements in such a way as to pass title to the land.

Held: That the appellants refused to execute deeds in order to perfect the title to the real estate given by parol to some of the children, resulted in annulling these gifts and the parties in possession are called upon to account for the rents and to be credited by the permanent improvements made by them on the property.

Judgments—Interlocutory—No Appeal.

There is no appeal from an interlocutory judgment which does not direct the payment of money.

Husband and Wife—Title of Personal Property Belonging to Wife Vests in Husband.

The intestate's first marriage was long before 1846, and at the death of the wife she was the owner of certain slaves, in her own right, prior to 1846, which under the law belonged to the husband after their marriage.

Executors and Administrators—Suit to Settle Decedent's Estate—Cost.

Where an administrator brings suit to settle the decedent's estate all the cost should be paid out of the general estate.

APPEAL FROM PENDLETON CIRCUIT COURT.

March 23, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

John Bradford died in the county of Pendleton, leaving his wife surviving him, and also twelve children, three of whom were by his first wife. His wife Sarah administered upon his goods, etc., and filed a petition in equity in the circuit court of Pendleton county for the settlement of her husband's estate. The intestate at the time of his death owned a large tract of land but very little personal estate. He had made during his lifetime advancements of property, real and personal, to his children, and his administrator for the purpose of having a full and complete

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settlement of the estate, and an equitable division thereof, between the children, filed an amended petition, in which these advancements made are sought to be charged against them. The children of the last wife in various suits against the children by the first wife in which they claim large sums of money by way of rents for land, and hire of negroes, alleged to have been used, occupied and controlled by the children during the lifetime of the intestate, and afterwards, and for the use of which they have wholly failed to account. A suit was also instituted against Nicholas Bradford by these children (appellants) for the purpose of setting aside a deed made by his father to him for a tract of land, upon the alleged ground of his want of intellect at the date of the deed to execute such an instrument. These suits were all consolidated and in April, 1870, an interlocutory decree was rendered settling, to some extent, the rights of the parties, and the case referred to the commissioner for the purpose of making a final report and settlement between those interested in the estate. This interlocutory judgment was directly connected with, and made part of the judgment appealed from and we think, looking to the facts presented in the record, was prejudicial to the appellants. The intestate had placed several of his children in the possession of parcels of his land, and gave them some of his negroes, intending no doubt that this property should be held and owned by them and to be accounted for in the final disposition of his estate between all of his children. His aversion to some of what he conceived to be the odious and exacting laws of Congress prevented him from executing deeds to his children (as he or the donees would then be compelled to conform to those laws by stamping the deeds), or from any writing evidencing the advancements in such a way, as to pass title to the land. The appellants refuse to execute deeds in order to perfect the title to this real estate sold or given by parol to some of the children, and this refusal results in annulling these gifts or contracts and the parties in possession are called upon to account for rents to be credited by the permanent improvements made by them upon the property. The interlocutory decree rendered in April, 1870, was no doubt intended to settle finally the rights of the parties, as to rents and improvements accruing previous to the intestate's death, but the appellants

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J. R. BOTTS *v.* J. M. TYREE.

Trial—Verdict Against Evidence—Court Will not Disturb.

The whole facts of the case were considered by the jury and they seem to have regarded the sale as made in good faith and this court when there is evidence upon which to base a verdict will not disturb it unless it is palpably against the weight of evidence.

APPEAL FROM CARTER CIRCUIT COURT.

March 27, 1872.

OPINION OF THE COURT BY JUDGE PRYOR.

The appellee proves the sale and delivery of the mare in controversy to him by James A. Tyree, the original owner. Tyree and Hall both swear that this sale was made, and that the appellee was afterwards in possession of the mare. The proof, however, conduces strongly to show that it was a mere temporary bargain made in order to elude the vigilance of some of Tyree's creditors. The whole facts of the case were considered by the jury and they seem to have regarded the sale as made in good faith, and this court when there is evidence upon which to base a verdict will not disturb it, unless it is palpably against the weight of evidence. Tyree's testimony was successfully impeached, but he is supported by the witness Hall, who stands uncontradicted by any other witness.

Judgment is affirmed.

Ireland, for appellant.

E. B. Wilhoit, for appellee.

J. C. ADAMS *v.* D. M. MCBARR.

Fraud—Sale of Land.

The appellee upon the reception of a fraudulent letter as to the value of the land proceeded to the home of the appellant and there upon the faith of this letter contracted to pay for the land ten times its value.

Held, that no chancellor would permit such an inconceivable bargain brought about by such fraudulent means to remain obligatory longer than he could annul it.

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APPEAL FROM SIMPSON CIRCUIT COURT.

March 28, 1872.

OPINION OF THE COURT BY JUDGE PRYOR.

The tract of land owned by the appellant in Camden county, Missouri, contained only eighty acres; its value did not exceed at any time so far as the proof shows two dollars per acre, or one hundred and sixty dollars. No discovery had been made of any valuable minerals on this land, or on any land adjacent thereto. There is nothing in its particular location to induce one to attempt a speculation by an investment in it. Intelligent persons living in the neighborhood of the land fixed its value at not exceeding two dollars per acre. There is nothing in the record to show that it had a speculative or imaginary value by reason of the supposed existence of valuable minerals beneath its surface. The appellant had by his agent in Missouri been estimating the tract at from one to two dollars per acre and it seems at no time to have increased in value in the county of its location, but upon the reception of the letters from Harris, Davis & Co., Henry I. Marstin and Jonathan Link by unsuspecting citizens of Franklin, Kentucky, this almost valueless land was held by the appellant at a fabulous price. The value placed upon it by those unknown correspondents was from five to ten thousand dollars by reason, as they suggest in their letters, of the minerals under its surface. The appellant about the time these letters are written or received, by some operation of his own mind, ascertains that there are minerals upon his land, and he fixes a value upon it, corresponding with the value as suggested in the letters of Jonathan Link and others. What induced the appellant to hold this land at such a fabulous price is unexplained by him. He had no information from his agent at Camden of the discovery of these hidden treasures, or from any other source, so far as appears from the testimony in this case. It is true he states that repeated offers had been made him for it, but not a letter nor a witness does he exhibit or call upon to testify in regard to these facts. If his land had advanced in value from one hundred to ten thousand dollars, he could at least have found one witness, or exhibited some letter evidencing a state of facts, upon which he had the right to base an opinion that

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his land was very valuable. The only letters that are exhibited are those from Jonathan Link and others to these credulous men in Franklin and the appellee upon the reception of one of them, that upon its face would have induced a business man to suspect fraud, proceeded to the office or home of the appellant, and there upon the faith of this letter contracted to pay for the land ten times its value. The local habitation of Harris Davis & Co., Henry I. Marstin and Jonathan Link has been clearly made known by the proof in this record, and no chancellor would permit such an inconceivable bargain, brought about by such fraudulent means, to remain obligatory longer than with pen and ink he could annul it.

The judgment of the court below is affirmed.

R. Rodes, for appellant.

Finn & Bush, W. P. D. Bush, for appellee.

W. P. CUNDIFF, ETC., *v.* GILLY CUNDIFF, ETC.

Wills—Sound Mind and Disposing Memory—Last Sickness—Undue Influence—Former Declarations—Intention of the Testator—Want of Capacity.

The decedent, previous to the execution of the writing purporting to be his will, had been ill for some time with some disease of the lungs. During the last ten days previous to his death, his suffering was intense and only relieved by the constant use of stimulants and opiates. His nervous system was much deranged, and he was kept alive by the constant use of opiates, and but for this would have been in his grave before the will was written. He had been resisting importunities of his son and wife to make this will for days before it was written. When approached on the subject his declarations were that he intended his children should be equal, and resulting in his constant refusal to execute such a writing. No consent was obtained from him that such a paper should be written until the night previous to his death and whilst the alleged will was being written opiates or stimulants were administered freely and two fans kept constantly in use in order to sustain life.

Many witnesses gave statements as to his delusions and the wanderings of his mind for two days and more preceding the writing of the will.

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Held, that whether these delusions originated from the large quantities of opiates taken, or from his weak and exhausted condition, it is unnecessary to inquire. His mind was not in such a condition as to have enabled him to have a fixed and settled purpose of his own in regard to the disposition of his property.

APPEAL FROM BULLITT CIRCUIT COURT.

March 29, 1872.

OPINION OF THE COURT BY JUDGE PRYOR.

James B. Cundiff died in the county of Bullitt in the year 1871, leaving his wife, Gilly Cundiff, and ten children surviving him. He owned at his death various tracts of land amounting, in the aggregate, to near one thousand acres, but left very little personal estate. He made frequent declarations during his last illness and before, of his intention to make all of his children equal in the distribution of his property. Not long after the death of James Cundiff his widow and some of the children presented to the county court of Bullitt, the county of the decedent's residence, a paper purporting to be his last will and testament, and offered the same for probate. No contest was made in regard to the validity of this paper in the county court, and upon the testimony of two of the subscribing witnesses, it was probated as his, the decedent's, last will. Seven of the children of Cundiff appealed from the order of the county court admitting the will to probate to the circuit court of that county, and the result in that court was *that the paper exhibited on the trial as the will of James Cundiff was his true last will*, and from that judgment these children have appealed to this court. They say that their father when he made the alleged will was not of sound mind and disposing memory, and that its execution was procured by an undue and improper influence exercised over him at the time of the execution of the paper, by his wife, Gilly Cundiff, and his son William. The writing in controversy gives all of his estate to his wife during her life with the direction that she is to clothe and educate his youngest children, and at her death he gives to his three sons, William, John and James, one hundred acres of land each, more than his other children, and to his daughter, Laura A. Engle, a child by his first wife, he gives a half portion, assigning as a reason therefor that he had previously

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made provision for her. In making the special devise of the one hundred acres of land to each of his three sons, he locates the particular land, and it greatly exceeds in value the same number of acres in the remaining parcels of his landed estate. The one hundred acre tract given to William is worth twenty or thirty dollars per acre, whilst the balance of his land, after excluding what is given to his other two sons, is only worth ten or twelve dollars per acre. The three sons get nearly one-half in value of the real estate, and the daughter by his first wife gets only half as much as the other children. The decedent, previous to the execution of the writing purporting to be his will, had been ill for some time with some disease of the lungs. During the last ten days previous to his death his suffering was intense and only relieved by the constant use of stimulants and opiates. His nervous system was much deranged, and both physicians testify that for one or two days previous to the execution of the will, he was kept alive by the constant use of opiates, and but for this would have been in his grave before the will was written. He had been resisting the importunities of his son William and his wife to make this will for days before it was written. When approached on the subject his declarations were that he intended his children should be equal, and resulting in his constant refusal to execute such a writing. These importunities upon the part of William were so frequent that the attending physician threatened to abandon his father's case unless he ceased his efforts in that direction. It had the effect to increase the nervous excitement of the man and was tending to hurry him to his grave. No consent was obtained from him that such a paper should be written until the night previous to his death. Life was kept in him by administering stimulants and opiates constantly. And whilst the alleged will was being written opiates or stimulants were administered freely and two fans kept constantly in use in order to sustain life. Many witnesses give statements as to his delusions and the wanderings of his mind for two days and more preceding the writing of the will. Whether these delusions originated from the large quantities of opiates taken, or from his weak and exhausted condition it is unnecessary to inquire. His mind was not in such a condition as to enable him to have a fixed and settled purpose of his own in regard to

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the disposition of his property, it appears that after the will was written and before it was signed by the decedent he imagined that "there was a horse in the room, and directed those present to take it out." It is hardly to be supposed that a man in such a condition could take a comprehensive view of his estate and to recognize fully the obligations settling upon him in finally disposing of his estate between his children. His declared intentions to equalize all his children in the division of his estate had been made long before his death and this intention was adhered to firmly until the advance of the disease on both physical and mental power enabled those interested in the distribution of his property to mould his will to suit their own purposes. The daughter of his first wife had by his bedside exhibited as much affection for the condition of her father as any of the other children. That affection was reciprocal upon his part. No complaint was made by this daughter upon his refusal to make a will or any effort on her part to prevent its execution. She is confined to a half share in her father's estate, upon the declaration made by him in this pretended will that he had previously provided for her. It does not appear, so far as this record shows, that she had even received one dollar, except in the presentation upon her marriage of a bed and other articles of trifling value. He had, in fact, given her nothing and recognizing an indebtedness to her by reason of his being her statutory guardian he relieves himself from liability by attempting to devise her the notes of her insolvent husband. Such a paper in the opinion of this court is not the offspring of a man able to dispose of an estate fairly and justly between one's children, or to transact the ordinary business affairs of life. The draftsman of the will had never seen the testator during his illness except during the time he was occupied in writing the instrument. His back was turned to the sick man whilst so engaged, and he held no conversation with him other than occurred in regard to the contents of the instrument itself, the substance of which had been impressed upon the mind of the testator by the repeated suggestions of the wife and son. Neither of the attesting witnesses examined for the propounders of the will give facts upon which their opinions rest as to the soundness of testator's mind, sufficient to overthrow or counter-balance the testimony of the contestants as to his want

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of capacity at the date of the instrument. The attending physician explains satisfactorily why he attested the paper and as evidence of his good faith in this regard he announced his opinion publicly to Dr. McKoy upon the question of the testator's capacity before it was written. In the opinion of this court the writing in controversy is not the true last will and testament of James B. Cundiff. Wherefore the judgment of the circuit court affirming the order of the county court admitting the same to probate as the last will of James B. Cundiff is reversed with directions to set aside the verdict and judgment of that court and to enter a judgment determining that the paper in controversy is not the true last will of James B. Cundiff and to certify the same to the county court with directions to set aside the order admitting the will to probate.

Lee & Rodman, Thompson, R. S. Meyler, for appellant.

A. H. Field, Wilson, for appellee.

ELIZABETHTOWN & PADUCAH RY. CO. v. DANIEL KLINGLESMTHS.**Eminent Domain—Measure of Damages—Enhanced Value—Instructions.**

As appellees are entitled to be paid the value of the land taken, notwithstanding any enhancement in the value of those not taken, by reason of the construction of appellants' road, the jury should have been instructed, that in estimating the value of the land taken, the enhanced value, if any, to the entire tract should not be allowed to enter into their estimate at all.

APPEAL FROM HARDIN COUNTY CIRCUIT COURT.

April 20, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY.

There was no error upon the part of the county court in admitting or refusing to admit testimony. Nor can we determine that it did not exercise a sound discretion in regulating the introduction of evidence and the argument of the cause.

The instructions given the jury, however, do not conform to the views of this court or to the law of the case, as expressed in the opinion delivered at this term in the case of this appel

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iant vs. Helm's Heirs. As appellees are entitled to be paid the value of the land taken, notwithstanding any enhancement in the value of those not taken, by reason of the construction of appellant's road, the jury should have been instructed that in estimating the value of those taken, the enhanced value if any to the entire tract should not be allowed to enter into their estimate at all.

The instructions as given allowed the jury to charge the railroad company with the value. The proposed construction of its road may have added to the land taken, and in this respect they were prejudicial to the party complaining in this court.

The judgment is reversed and the cause remanded for a new trial upon the principles herein indicated.

The questions in controversy between Wintersmith and the Klinglesmiths can not be settled upon this appeal. One appellee can not prosecute a cross appeal against another. Wintersmith must prosecute an original appeal, which may be done upon this record, but there must be service of process.

Brown & Murray, Pindell, for appellants.

Wintersmith, for appellees.

CALEB OLDHAM v. M. M. PRICE, ETC.

Principal and Surety—Co-Surety—Contribution—Action for—Necessary Allegations.

There is neither allegation nor proof in this case showing the insolvency of the principal or that he has failed to pay the money to appellant. A surety has no right to recover of his co-surety in the event the principal is solvent. A suit cannot be maintained by one surety against a co-surety without this allegation.

Pleadings—Amendments—Cost.

Where the allegations of a petition do not state a cause of action the plaintiff should be required to pay all the cost, on reversal of the case, before he should be allowed to amend.

APPEAL FROM ESTILL CIRCUIT COURT.

January 20, 1872.

Opinion of the Court.

AFFIRMED ON ORIGINAL AND REVERSED ON CROSS APPEAL.

Wesley White was the statutory guardian of Mary Jane Dillingham, and as such gave bond as required by law with Caleb Oldham, Morton M. Price, Simpson Patty and Benjamin O. Moore, his sureties. The appellant Oldham filed the present petition in equity alleging that judgment was obtained against himself and his co-sureties on this guardian bond for the sum of \$7,000—that Benjamin Moore, one of the sureties, removed from Kentucky to Missouri, where he died, leaving property and without ever having paid any part of that judgment, and that one-half of the judgment had been paid by him, Oldham—he makes the heirs of Moore defendants to this action, alleging that they own property in Kentucky and that they would receive by descent from the estate of their father in Missouri property of much more value than he was compelled to contribute, and was liable for on the guardian bond of White. His other co-sureties were made defendants and the appellant also asks that they be compelled to contribute what he has had to pay for his co-surety Moore in the event Moore's estate is insolvent. Upon the hearing of the cause the court below adjudged that the heirs of Moore were not liable and rendered a judgment against Price, one of the sureties, requiring him to contribute. Oldham, not being satisfied with the judgment, appeals to this court. There is neither allegation or proof in this case showing the insolvency of White, the guardian, or that he has failed to pay the money to appellant. The appellant has no right to recover of his co-sureties in the event the principal is solvent and able to pay. A suit cannot be maintained by one surety against a co-surety without this allegation. The judgment is affirmed on the original and reversed on the cross appeal of Price with directions to the court below to allow the appellant to amend his petition as to Price and upon his failure to do so to dismiss the petition. The appellant in the event he amends his petition should be required to pay all the costs up to the filing of the amendment.

Burnam, for appellant.

Lilly, W. B. Smith, for appellees.

Opinion of the Court.

PETER SMITH v. JERRY JOHNSON, ETC.

Municipal Corporations—Improvement of Sidewalks—Action to Recover for Necessary Allegation—Notice—Demurrer.

The petition is defective in failing to allege that Johnson had notice of the passage of the ordinance by the council, to repair the streets, nor are facts alleged showing the failure of the city council to take such action as to make the appellee liable for the work.

APPEAL FROM KENTON CIRCUIT COURT.

January 26, 1872.

OPINION BY JUDGE PETERS.

Although the demurrer of Johnson and wife, and that of the city of Covington, were both sustained to the petition and leave was granted appellant to amend it, he failed to do so, and took the risk of a trial in this court.

The petition is palpably defective in failing to allege that Johnson and wife had notice of the passage of the ordinance by the council to repair the sidewalks fronting their property, either actually or constructively. It is not averred that said ordinance was printed in the newspaper of a city, or otherwise, and circulated as required by Sec. 6, Art. 2 of the charter of the city, which might have been regarded as constructive notice to Johnson and wife, and thereby made them responsible. Nor are facts alleged showing the failure of the city council to take such action by it as to make Johnson and wife liable for the work, and thereby throw the responsibility on the city.

Wherefore the judgment is *affirmed*.

Moar, for appellant.

R. D. Handy, Baker, for appellee.

GUSTAVUS SCHURMAN, ADMR., v. C. J. JONES.

Landlord and Tenant—Sub-Tenant in Possession by Consent of Landlord—Sub-Tenant Forced to Abandon Premises by Landlord.

Where a sub-tenant is in possession with the consent of the landlord, and if without any breach of the terms of the lease, he causes him to abandon the premises he should be held to the consequences of his own act.

Opinion of the Court.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.**February 2, 1872.****OPINION BY JUDGE PETERS.**

The first instruction asked by appellant should not have been given because by the terms of the lease the tenant was authorized to sub-let the premises by the parol consent of the landlord, and although the lease is contradictory, still the letter of appellant's intestate was his written consent under certain conditions, so that in any event the instruction should not have been given without qualification.

The second one was also overruled properly, because it failed to set forth the conditions and to refer to the jury the question whether or not they believed from the evidence the conditions were complied with.

The evidence shows pretty conclusively that the sub-tenants were in possession with the consent of the landlord, and if without any breach of the terms of the lease he caused them to abandon the premises he should be held to the consequences of his own voluntary act.

Judgment affirmed.

I. R. Greene, for appellant.

Pirile & Caruth, for appellee.

W. J. STEPHENS v. N. E. BOSWELL.**Attachment—Sale of Personal Property to Avoid Debt—Possession by Vendor.**

Where a debtor sells personal property and still retains the possession it will be presumed that the sale is fraudulent as to attaching creditor.

APPEAL FROM KENTON CIRCUIT COURT.**January 18, 1872.****OPINION BY JUDGE PRYOR.**

There was never any change of possession of the household furniture under the pretended sale by Williams to his brother-

 Opinion of the Court.

in-law, Stephens. The property sold consisted of furniture in the home where Williams and his family had been living for months; had been purchased by Williams or his wife and used and owned by them until about the time that Williams left Covington for St. Louis. He then pretends to have sold it to appellant and delivered him the keys of the house. The wife of Williams did not accompany him to St. Louis, but remained in the home, expecting her husband's return from the latter place. The furniture was packed and boxed to be shipped to St. Louis when appellee's attachment was levied upon it. Upon the execution of the bond for the forthcoming of the property, etc., it was shipped to St. Louis, and there again placed in the home of Williams, and used by him, or his family, except a portion of it that Mrs. Williams says was sold and the proceeds paid over to appellant. We are driven to the conclusion from the facts proven that the object of this sale was to avoid the payment of the debts of Williams and that the court below properly sustained the attachment.

Carlisle, for appellant.

Fists, for appellee.

 GEORGE STIVERS ADMR. v. BARTON POTTERS ADMR.

Executors and Administrators—Demands Against Estate—Affidavit of Complaint—Contest by Executor—Ex parte Statement not Competent.

If a voucher against a decedent's estate is made out and proven according to law, this does not preclude the executor from contesting it and where an issue is formed the ex parte statements made in the form of an affidavit cannot be read without the consent of the parties.

APPEAL FROM CLAY CIRCUIT COURT.

March 16, 1872.

OPINION BY JUDGE PRYOR:

The law requires an affidavit by the claimant of the justice of the demand for the protection of the decedent's estate, and to enable the personal representative to form some idea of its correctness before he pays it.

Opinion of the Court.

If a voucher against a decedent's estate is made out and proven according to law, this does not preclude the executor or administrator from contesting it, and in a case like this, when an issue is formed and a jury sworn to determine that issue, the ex parte statements made in the form of affidavits cannot be read as evidence without the consent of the parties.

The court erred in refusing to exclude the affidavits upon the motion of the attorney for the appellant. The judgment of the court below is reversed and cause remanded with directions to set aside the verdict of the jury and award to the appellants a new trial and for further proceedings consistent with this opinion.

Dishman, for appellant.

James, for appellee.

H. C. SOWARDS *v.* THOS. E. HENDERSON, ETC.

Evidence—Statements—When Competent.

The sale of the lumber to Brumley was made by Sowards and his declarations at the time were competent as to the ownership of the property.

March 12, 1872.

APPEAL FROM BOYD CIRCUIT COURT.

OPINION BY JUDGE PRYOR:

The sale of the lumber to Brumley and Gallup was made by Morgan Sowards, and his declarations or statements at the time were competent as to the ownership to the property. The note was executed to the brother at the suggestion of Morgan Sowards and the reason given by him at the time for having it so written. There is no exception to the deposition and no pretense that Morgan was acting as agent for his brother. If he was, the fact could have been easily established. We are not disposed to disturb the judgment and the same is therefore affirmed.

C. W. Brown, for appellant.

Moore, for appellee.

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MARGARET SLACK v. HARRIET ROWLHAC.

Attorney and Client—Relation Ceases at Death of Client—Limitation.

The relation of attorney and client ceases upon the death of the latter and the statute of limitation begins to run at that time.

Limitation of Actions—Reply not Permitted Unless Answer Contains Counterclaim or Set-off.

A reply to a plea of limitations is only permitted where there is a counterclaim or set-off by the defendant in his answer.

APPEAL FROM FULTON CIRCUIT COURT.

February 27, 1872.

OPINION BY JUDGE PRYOR:

The relation of attorney and client between appellant and Hallett ceased to exist at the death of the latter, and the trust arising from the employment and the collection of the money also terminated. The failure of the appellant to sue, within five years and six months, his personal representative made the statute a successful defense to the appellant's claim, and there is no proof bringing the case within any of the exceptions of the law preventing the statute from running. The reply was improperly filed to this plea of limitation. Such pleading is only permitted when there is a counterclaim or set-off by the defendant in his answer. *5Bush* 558. Judgment of the court below is affirmed.

Randle & Taylor, for appellant.

Williams, for appellee.

JOHN SEBER v. R. W. NELSON.**Trespass—Action Against Constable for Damages for Sale of Property Under Execution May be Pleaded in Bar of an Action for Recovery of Specific Property.**

The constable had sold the property under execution and appellant elected to sue in trespass for the value of the property in which he obtained judgment against the constable. He cannot now maintain this action against appellee who obtained possession by his purchase under the execution.

Opinion of the Court.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 16, 1872.

OPINION BY JUDGE PRYOR:

The action of trespass instituted by the present appellant against John A. Nelson, the constable, in which he seeks not only to recover damages for the alleged trespass but also the value of the horse and two mules sold by him under the execution against Jacob Steiger, was properly pleaded as a bar to the present action of the appellant against the appellee for the recovery for the same property. The verdict of the jury for the appellant in the suit against the constable was for sixty dollars, the value of the brown mule, and the title to the horse and the other mule being put directly in issue in that suit, and the appellant failing to recover was in effect determining that this horse and mule was subject to the execution against Steiger. The constable had sold this property under the execution and the appellant elected to sue in trespass for the value of the property. He obtained the judgment against the constable and cannot now maintain this action for the recovery for the specific property as against the appellee, who obtained possession of it by his purchase under the execution. The judgment is affirmed.

*Hawkins, Baker, for appellant.**Hallam, for appellee.*

HENRY D. McHENRY, ETC., v. WM. PHELPS, ETC.**New Trial—Motion for Must be Made in Lower Court.**

It is essential that the party complaining shall make a motion for a new trial in order to have errors corrected by the court of appeals.

APPEAL FROM OHIO CIRCUIT COURT.

February 22, 1872.

OPINION BY JUDGE LINDSAY:

Where the matters in litigation have been properly submitted to a jury, it is essential that the party complaining shall make

Opinion of the Court.

a motion for a new trial, in order to entitle himself to have errors to his prejudice corrected by the court of appeals. 4th Bush 46. No such motion seems to have been made in this case. Wherefore as this court cannot review the proceedings had in the circuit court, the judgment must be affirmed.

Conklin, John Chapeze, for appellant.

G. M. MULLIGAN v. G. W. NEETER.

Attachments—Levy Confers no Title but Mere Equity—Interest of Creditors.

When an attaching creditor places his attachment in the hands of the sheriff and has it levied he acquires no legal right or title to the property. It is a mere equity and he cannot sell more than his creditor's interest.

Attachments—Prior Equity Not Affected by Levy—Title Bond Creates Equity.

If A has a bond for title to land from B and C, after the date of the bond attaches the land, the equity of A must prevail.

February 28, 1872.

APPEAL FROM ALLEN CIRCUIT COURT.

OPINION BY JUDGE PRYOR:

The deed made to the appellant for the land in controversy was executed on the 23d of April, 1870, and acknowledged on the 29th day of the same month, and recorded on the 2d of May of the same year. The attachment was issued, or placed in the hands of the sheriff, on the 25th of April, the same day on which the deed to the appellant was acknowledged. The attaching creditor, when he places his attachment in the hands of the sheriff and has it levied, acquires no legal right or title to the property attached. It is a mere equity, and by the levy he acquires the right to sell no other interest in the property than his debtor had in it at the time the levy was made. If third persons have prior equities existing before the attachment is issued and these equities are asserted, the attachment creditor's claim is subordinate to such equities.

In this case the land had been sold before the attachment was issued or was placed in the hands of the sheriff, and whether

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acknowledged or not it created an equity prior in date to the equitable claim of the appellee. If A has a bond for title to land from B and C after the date of the bond attaches the land, the equity of A must prevail if asserted as it is prior in date. In this case there is no fraud alleged, and the question presented is a contest between equities and the older equity must succeed, in fact the record shows that the equity of the appellant has been merged into the legal title. The judgment of the court below is reversed and cause remanded for further proceedings consistent with this opinion.

Gatewood, for appellant.

Leslie, for appellee.

ROBERT McNAY v. WILLIAM HARRIS.

Trespass—Action for—Actual Possession—Not Necessary to Show Chain of Title to Commonwealth—Limitations.

This being an action for trespass to real property, actual possession, at the time of the entry of appellant was sufficient to enable appellee to maintain his suit. It was not necessary that he should show a perfect chain of title back to the commonwealth, nor an actual adverse holding for the term of fifteen years preceding the alleged trespass.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 15, 1872.

OPINION BY JUDGE LINDSAY:

This being an action for trespass to real property, actual possession, at the time of the entry of appellant, was sufficient to enable appellee to maintain his suit. It was not necessary that he should show a perfect chain of title back to the commonwealth, nor an actual adverse holding for the term of fifteen years preceding the alleged trespass. For these reasons the instructions given at the instance of the appellee, all of which make his right to recover depend upon whether the land is covered by the deeds under which he claims title, or an actual adverse possession for fifteen years, are less favorable to him than they should have been.

Opinion of the Court.

The testimony shows that there is an ancient marked line running from the corners B and C as laid down on the plat made out by the surveyor Rogers. There is evidence conducing to show that appellee held to this line and that within a short time before the commission of this alleged trespass, McNay recognized the fact that his possession extended to this line.

It is true that there is some contrariety of evidence on the question of possession, but we can not say that the preponderance is against the finding of the jury.

The instructions given on the motion of appellant are certainly as favorable as the law of the case would warrant.

The judgment of the circuit court must be affirmed.

Riley, Menzies & Furber, for appellant.

Ducker, Hawkins, Boden, for appellee.

JOHN MARTIN AND WIFE v. R. E. ALLEN, ETC.

Husband and Wife—Power of Husband to Purchase Land for Wife, Subject to Her Approval—Recording Deed does not Conclude Wife.

Where it is conceded that the husband's power to purchase land for his wife was restricted to her ratification and approval and that she had neither ratified nor approved the purchase nor accepted the conveyance, the fact that the deed had been recorded does not conclude her. She may still raise an issue of fact as to whether or not she accepted it.

APPEAL FROM MC CRACKEN CIRCUIT COURT.

March 4, 1872.

OPINION BY JUDGE LINDSAY:

As the suit of *Allen v. Martin, Executors*, was consolidated with that of *Wm. I. Martin*, and thereby all the necessary parties brought before the court in each case, the demurrer to Allen's petition was properly overruled. The demurrer to the amended answer of Mrs. Eliza M. Martin admits that the property bought from King was purchased for her benefit by her husband; that the two-thousand-dollar judgment made cash in hand was paid

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out of money belonging to her individually, and in which her said husband had no interest. That his authority to invest her means in such property was restricted to the right to negotiate the contract, and that was not to be consummated until ratified and approved by her; that she had never ratified the purchase of the house and lots from King, and that she had not accepted the conveyance made to her by King and wife. And further that King had no title to the property in question. To concede the existence of these facts, it seems to us is to concede the right of Mrs. Martin to a rescission of the contract between King and her husband, unless the latter can within a reasonable time invest himself with the title to the property. The mere fact that the deed had been put to record does not conclude Mrs. Martin. She may still raise an issue of fact as to whether or not she has accepted it. If she has not accepted it, the contract of sale is still executory, and ought not to be specifically enforced, in case her answer should be sustained by proof. The demurrer should have been overruled, and her vendor King made a party defendant to her cross petition, and in case it turns out that his deed has not been accepted he should be compelled to make exhibition of his title. The judgment appealed from must be reversed. The cause is remanded for further proceedings consistent with this opinion.

Bigger & Moss, for appellant.

King, for appellee.

R. S. STEINBERGER v. B. F. TAYLOR, ETC.

Judges—Special Judge of Police Court—No Statutes Authorizing Appointment or Selection—Findings and Judgments Void—No Appeal Lies to County Court.

There is no statute authorizing the appointment of a special judge of a police court. The selection by the parties does not invest him with judicial functions. His finding and judgments are nothing more than an award and cannot be enforced as a judgment. No appeal lies to the county court.

Opinion of the Court.

Judges—Special Judge of Police Court—Appointment of Commissioner—Compensation of Commissioner is a Part of Amount in Controversy.

The special judge having no jurisdiction, his order appointing a commissioner was void and he was not entitled to compensation. The allowance of one hundred dollars to the commissioner does not come within the general term of cost; hence it must be considered in determining the amount in controversy on appeal.

January 5, 1872.

APPEAL FROM MERCER CIRCUIT COURT.

OPINION BY JUDGE LINDSAY :

We are not aware of any statute authorizing the appointment or selection of a special judge to hold the court or to try any cause pending in the court of the police judge of the town of Harrodsburg. The selection of E. T. Folk, esquire, by the parties could not invest him with judicial functions. His finding and judgment, though entered upon the record books of said police judge, were nothing more than an award, and could not be enforced as a judgment. Hence no appeal would lie therefrom to the circuit court of Mercer county, and as the amount involved in the litigation was less than fifty dollars, that court had no original jurisdiction of the subject-matter.

The action of such court was therefore not merely irregular, but wholly unauthorized. Having no jurisdiction the order was void. The commissioner, having no legal right to act under such order, was entitled to no compensation for his services from appellants who objected to the reference and also to the commissioner.

The judgment in favor of appellee is void, as is also the order making the allowance of one hundred dollars to the commissioner. This allowance does not come within the general term of costs, but was a special and illegal allowance. Hence it must be considered in determining the amount in controversy in this appeal. The cause is remanded with instructions to the circuit court to set aside the judgment and order complained of and to dismiss the proceeding.

J. B. Thompson, for appellant.

Kyle & Keller, for appellee.

Opinion of the Court.

E. M. SPRINGFIELD *v.* WEBSTER COUNTY.

Sheriffs—Settlement for County Levy—County Judge Acts Ministerially and Not as a Judicial Officer—Remedy of Sheriff by Mandamus—Not Appeal.

Section 20 of the civil code does not authorize an appeal from the orders or judgment of a county court relative to the settlements by sheriffs of their accounts as collectors of the county levy. The county judge acts ministerially and not as a judicial officer in receiving and approving the settlement and if he refuses to allow the sheriff the lawful commissions, the remedy against him is by mandamus and not by appeal.

APPEAL FROM WEBSTER CIRCUIT COURT.

March 11, 1872.

OPINION BY JUDGE LINDSAY:

The appellate jurisdiction of circuit courts is regulated by Sec. 20, Civil Code.

This section does not authorize appeals from the orders or judgments of county courts relative to the settlements by sheriffs of their accounts as collectors of the county levy. For such services the law fixes the compensation of the sheriff, and the county judge acts ministerially, and not as a judicial officer in receiving and approving the settlement made by his commissioner with the sheriff. If he refuses to allow the sheriff his lawful commissions, the remedy against him is by mandamus and not by appeal.

It is difficult to determine what effect should be given to the act of March 7, 1867 (Session Act 1867, page 74), but we are satisfied that the allowances or appropriation therein referred to must be claims against the county in favor of numerous individuals or corporations, and not commissions allowed by law to public officers.

Where officers are entitled to a more speedy and effectual remedy than that of appeal, we will not conclude that the Legislature intended by implication to deprive them of rights essential to them and so long enjoyed.

Opinion of the Court.

We are of opinion that the circuit court had no jurisdiction of the appeal in this case and, therefore, that it did not err in dismissing it.

Judgment affirmed.

Givens, for appellant.

Rodman, for appellee.

MT. STERLING & SPENCER TURNPIKE ROAD COMPANY v.
W. B. SLOCUM.

Contracts—Building Turnpike—Work Incomplete—Estimate.

When appellee gave up his contract the Turnpike Company agreed to pay him the contract price for the work done and the estimate was to be made by the appellant's engineer.

Held: That it was the duty of the company to ascertain the amount due appellee before involving him in litigation.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

February 18, 1872.

OPINION BY JUDGE LINDSAY:

The circuit court did not err to appellant's prejudice in striking from the case so much of the answer as seeks to make Gibbons a party to this litigation.

It is manifest that when Slocum gave up his contract the Turnpike Company undertook and agreed to pay him for so much work as he had then done, at the contract rate. The estimate of the amount of such work was to be made by the company's own engineer; it was, therefore, the duty of the appellant to ascertain the amount due to appellee, and it had no right to involve him in litigation with Gibbons in order to have determined a matter of fact which the company had agreed to have settled by one of its own officers.

It is not denied that the amount for which judgment was rendered in favor of Slocum was due from the company, and there is no evidence tending to show that Gibbons had any claim upon such amount.

 Opinion of the Court.

The bill of exceptions does not show what appellant expected to prove by either one of the rejected witnesses. It is, therefore, unnecessary to discuss their competency.

We perceive no error in the proceedings in the court below which will authorize a reversal.

Judgment affirmed. Gibbons having no interest in the matters involved in this controversy his appeal is dismissed.

Turner, Brock, R. Reid, for appellant.

Apperson, for appellee.

 H. C. MERHOFF v. HOPE INSURANCE COMPANY.

Insurance—Mutual Companies—Power to Borrow From One Fund to Pay Charges Against Another.

By the provisions of the charter the directors were authorized to borrow money to pay losses, there is no reason why they should not borrow from the stock fund of the company instead of going into the money market.

Insurance—Mutual Companies—Assessments—Notice—Failure to Pay—Default—Loss of Insurance.

Where the charter provides that if a member neglects to pay an assessment for thirty days after it should become payable is excluded from all benefits under his insurance, constitutes notice of the contract between the company and the member and is in no sense a forfeiture of his interest in the company, but it is an equitable limitation on the right of the first to break the covenant to recover on it.

Insurance—Mutual Companies—Notice of Assessment—Publication.

The object of the charter in requiring the notice of assessments to be made public was that each member of the company might have an opportunity to inform himself of the fact and after thirty days publication the law would imply notice and hold the member to the consequences of non-payment, although he had no actual notice of his duty to pay.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 16, 1872.

OPINION BY JUDGE LINDSAY:

It appears from the testimony of Bly, who is the witness of appellant, that the assessment of July, 1868, was made for the

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purpose of returning the money borrowed from the stock fund to pay that portion of the losses and expenses chargeable to the mutual insurers. The exact amount due for the purposes is not stated by the witness, but he makes no disclosure showing that the assessment was illegal. Under the nineteenth section of the charter the directors were authorized to borrow money to pay losses, and as the company owned two separate funds we can perceive no good reason why the mutual insurers might not borrow from the stock fund of the company instead of going into the money market.

The 22d section, in so far as it provided that members of the company who should neglect or refuse to pay any assessment duly ordered for the term of thirty days after it should become payable, should be excluded and debarred of, and lose all benefit and advantage of his or her insurance for and during the term of such non-payment or default, constituted an essential notice of the contract between the company and the member. The suspension of the policy held by such member was in no sense a forfeiture of any interest held by him. It was an equitable and proper limitation upon the right of those who had first violated and broken their covenant to recover in an action on such covenant. The party who had notice of the fact that a legal assessment had been made against him, and voluntarily neglected to pay it for more than thirty days after such notice, thereby elected to suspend his right to collect the amount of his policy of insurance in case of loss. The object of the charter in requiring the notice of the assessments to be made public was that each member of the company might have an opportunity of acquiring information of the fact that such assessment had been made. Thirty days after publication, the law would imply notice to each member and hold him to the consequences of non-payment, even though the publication had wholly failed to apprise him of the existence upon his part of the duty to pay.

This being true, it is manifest that when the policy holder had actual notice, whether he received it through the newspapers, or by letter or circular and failed to pay, that he was wilfully in default and ought not be heard complain that the terms of his contract are asked to be enforced by the company.

It is immaterial whether appellant received the notice mailed

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to him or not, as the rule of the chancery court when served on him was actual notice of his indebtedness. His failure to pay within thirty days thereafter was an election upon his part to suspend his rights under his policy of insurance, and after the destruction of the property insured he could not make a payment of the assessment so long withheld relate back to the time of the fire.

The judgment of the chancellor dismissing his cross petition must be affirmed.

M. Mundy, for appellant.

J. G. Wilson, for appellee.

JOHN McELROY v. GEORGE DUNN.

Principal and Surety—Depositions Taken in Another Case are Competent Evidence that Party then Claimed to be Principal and not Surety.

The depositions taken by Allen & Dunn in their suit with Boynton are admissible as evidence in this case, to show that at that time Dunn was asserting that he and Allen were partners in the purchase of the mules.

Principal and Surety—Statute of Limitation—Estoppel.

The conduct of the appellant was such as to induce appellant to believe that he was a principal in the note and not surety, therefore he is estopped to plead the statute of limitation of seven years.

APPEAL FROM MARION CIRCUIT COURT.

January 12, 1872.

OPINION BY JUDGE LINDSAY:

The depositions taken by Allen and Dunn, to be read as evidence in their suits with Boynton, were held to be admissible as evidence in this case, to show that at the time such depositions were taken Dunn was asserting that he and Allen were partners in the purchase of the mules from McElroy.

Of course it was the province of the jury to consider the depositions themselves, the conduct of Dunn in taking them and other circumstances attending their taking, and to determine

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therefrom whether or not he was then either expressly or impliedly making such assertion.

It seems, however, that the deposition of McElroy was taken, and he insists that Dunn attempted to prove the fact of the partnership purchase by Allen and himself of his (McElroy) mules. That such attempt was calculated to induce him to conclude that Dunn did make the purchase as a partner, and, therefore, that he was a principal and not a surety on the note given for the mules.

That even if he was mistaken in this conclusion, that it was the natural and legitimate result of Dunn's conduct, and that the latter is estopped as to him from denying that such is the fact.

The third instruction given at the instance of McElroy is based upon this view of the law. By it the jury were told that if they believed from the evidence that Dunn had McElroy's deposition taken and proved by him that he (Dunn) purchased the latter's mules as a partner of Allen, that he knew that McElroy had so sworn and failed to notify him that he was only a surety and not a principal in the note for suit to be brought thereon before the seven years' limitation had become complete, then the law was for McElroy.

We are of opinion that the instruction was proper. If Dunn, to advance his own interest in the suit with Boynton, misled McElroy and lulled him into the belief that he was a principal in the note, and permitted him to labor under this mistake until limitation had run, he cannot be allowed to rely upon such pleas.

Instruction No. 4, given for appellee, although correct in one view of the case, should have been so modified as to have been made consistent with Instruction No. 3. As it was given, the two instructions are conflicting and were well calculated to mislead the jury.

For this error alone the judgment is reversed.

The cause is remanded for a new trial.

W. B. Harrison, for appellee.

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JOHN MCKEE *v.* JAMES P. LAND.**Partnership—Payment of Individual Debts with Partnership Funds—
Knowledge by Other Partner—Estoppel to Recover.**

Where one partner pays his individual debts with partnership fund, the other having knowledge of the fact, is thereby estoppel to recover of the individual creditor the amount so paid.

January 19, 1872.

APPEAL FROM HARRISON CIRCUIT COURT.

OPINION BY JUDGE PRYOR:

The questions involved in the present appeal are identical with those already decided in the case of *Land v. Land*. The opinion of this court in that case determines the rights of the appellant as between himself and the individual creditors of C. G. Land. C. G. Land, the alleged partner of the appellee, had been merchandising in Cynthiana some time previous to the formation of the partnership that they say was formed in the year 1865. The money, or the greater part of it, for which the notes of C. G. Land were executed to the appellant, was used by the former in purchasing his stock of goods. After this money had been so invested the appellee (his brother) entered into a written agreement of partnership with him. The brother living in a distant county employed an agent by the name of Cosby to attend to his interest in the store, or to use the language of the witness for the appellee, "he employed Mr. Cosby to attend to the business for him." C. G. Land, from the date of the agreement of partnership in 1865, used and disposed of the assets of this firm in buying lots, making improvements thereon for his individual purposes; borrowing money in his own name and entering it upon the books of the firm to his credit; using this money in replenishing his stock of goods, and in fact conducted in every way this store as if he were the sole owner of the establishment. Nearly all of these business transactions showing the application by him of the partnership assets to his individual purposes, and entered upon the books of the firm, and no one so far as this proof shows, living in the vicinity of this store, had any knowledge of the existence of this partnership except C. G. Land, Cosby and the appellee. It is

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true the sign over the door was that of C. G. Land & Co., but the actual business transactions connected with the sale and purchase of goods with the customers, and the everyday business of the house as conducted by C. G. Land, were all evidence conducing strongly to show that C. G. Land was the owner of the establishment, but conceding that he was not, and that the creditors all knew that the appellee was his partner, and still the appellee has no equity as against these creditors. The appellee, by his agent Cosby, who was placed there by the appellee to protect his interest and to act for him, saw the partnership assets applied to the payment of C. G. Land's individual debts from 1865 to 1868. It was an everyday transaction, and the evidence of the action of C. G. Land in this regard was entered upon the firm books and the agent Cosby must have known all about it, and in fact C. G. Land, appellee's witness, swears "that Cosby was cognizant all the time of what was going on." In view of all these facts the appellee comes into a court of equity and seeks to recover back this money paid the individual creditors, for the reason that the creditors knew that it was a misapplication of the funds, or at least that he himself was entirely ignorant of what was going on. If A stands by and sees B sell his property to C and asserts no claim to it in any way, A is estopped therefore from recovering it from C.

In this case the appellee permitted this partnership property to be used by his brother as he pleased for a period of two years. He knew all about it; his agent was there in person attending to it by his direction and employment, and we are constrained to believe that the appellee himself sanctioned it, and we again remark—that it is a little strange that the appellee made no discovery of the conversion of these partnership effects by his brother until his bankruptcy. Nor is the appellant precluded by the pleadings in this case from relying upon the facts proven as a defense. He denies in substance that the partnership existed, or that he knew of its existence; he denies that partnership monies or effects were paid him by C. G. Land, thus placing the burden of proof on the appellee, by which he is required to make out a case entitling him to recover. The failure to deny the allegation, made in the petition that "he the plaintiff had no knowledge of the misapplication of the partner-

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ship funds," does not preclude the appellant from proving such knowledge on his part. If the petition had stated—that appellant knew that these goods and monies were partnership property, and that C. G. Land had no authority to appropriate the partnership property, then a failure on the part of appellant to make denial would estop him from relying on this defense. We think the denial of the answer is sufficient. The judgment is reversed and cause remanded with directions to sustain the exceptions to the report of the commissioner so far as the claim of \$349 with interest is allowed as against the appellant and for further proceedings consistent with this opinion.

John T. McClutock, for appellant.

J. Q. Ward, for appellee.

ANN McDONALD'S TRUSTEE *v.* R. D. HAYMAN.

Husband and Wife—Separate Estate of Wife not Subject to Husband's Debts—Rent.

The renting of property by a husband and wife, does not in law or equity make the wife responsible for the rent and her separate estate cannot be subjected to the payment of her husband's debts.

Husband and Wife—Feme Sole—How Created.

The statute provides that upon the joint petition of husband and wife, a court of equity is invested with the power to authorize a married woman to use, sell and convey any property she may have or thereafter acquire, and may contract, sue and be sued as a feme sole.

Husband and Wife—Separate Estate—Husband Cannot Create—Without Creditor's Consent.

The husband cannot invest his wife with a separate estate in his own property, even in the proceeds of her own labor, to the prejudice of his creditors, but it may be done with the consent of the creditor, and in that event he is estopped by his own act to coerce payment of his debt out of the wife's separate property.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 11, 1872.

Opinion of the Court.

OPINION BY JUDGE PRYOR:

The only objection to the petition in this case is—that the trustee failed to make the husband of Mrs. McDonald a party to the action. The defect was afterwards cured by making the husband a party. The demurrer to the answer and amended answer of the defendant should have been sustained.

The separate estate of the wife cannot be subjected to the payment of the husband's debts. Conceding the fact that from the trial of the case it appeared in evidence as is alleged in the answer that the money for which the two notes in controversy was executed was the earnings of the wife's labor, and that all the allegations in the answer upon that subject are true, and they must be so regarded on demurrer, still the renting of the property by the husband and wife does not in law or equity make the wife responsible for the rent. The law prescribes the manner in which the wife may be made responsible upon her contracts, and also when she may act and trade as a *feme sole*. By a statute enacted in February, 1866, upon the joint petition of husband and wife, a court of equity is invested with the power to authorize a married woman to use, employ, sell and convey any property she may have or thereafter acquire, and may make contracts, sue and be sued, as a *feme sole*. The answer did not allege any such power conferred upon the wife in this case, and there was no reason why the goods in the possession of the wife were not liable for the husband's debts. Nor is there any separate estate alleged to exist in the wife by reason of any contract or otherwise. The allegation is that she was carrying on her separate business, and even conceding that it was separate estate she is not then liable for the rent. The pleadings, however, in this case show that the appellant had notice of the claim set up by the wife to the proceeds of her labor as her separate property, and this long before the greater part of his demand originated. He had rented his property to the husband and wife, and in borrowing the money, knowing that it was the husband, he executes the notes to the wife and she, in order to secure herself more certainly in the enjoyment of her own labors, assigns these notes to a trustee for her sole use and benefit.

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The appellant makes a payment on one of these notes after they are assigned to the trustee, and when, as he alleges, the wife was indebted to him in a large sum of money. The husband cannot invest his wife with a separate estate in his own property or even in the proceeds of his wife's labor to the prejudice of his creditors, but it may be done with the consent of the creditor as in this case. The appellant not only executes his note to the wife, which was evidence to him of her claiming it in her separate right, but afterwards when assigned to the trustee makes a payment upon it. There is no allegation of fraud in the answer, but on the contrary the proceedings disclose the fact that the appellant was instrumental in creating this separate estate in the wife. He is estopped by his own act from coercing this claim for rent out of the notes in controversy. The judgment of the court below is reversed and cause remanded with directions to enter a judgment for the appellant for the amount of the notes and interest and for further proceedings consistent with this opinion.

Mallam, for appellant.

Root, for appellee.

LOUIS MILLITZ *v.* WM. SCHUFF.

Principal and Surety—Agreement for Indulgence—Void Contract Does not Suspend Right to Sue Principal.

Six months after the maturity of the note the principal paid ten dollars and the holder agreed to indulge the principal for another six months and this was continued for every six months up to some time before the institution of the suit. These partial payments were not credited on the principal of the note but was the usurious interest charged.

Held: That the agreement for indulgence was void and could not be enforced, consequently it did not suspend appellant's right to sue on the note, nor was the surety thereby released from his obligation to pay the debt.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

February 21, 1872.

Opinion of the Court.

OPINION BY JUDGE PETERS:

This action was brought by appellant on the 9th of December, 1870, against F. Wurtman and W. Schuff on a note executed by them to appellant on the 22d of November, 1866, for two hundred and ten dollars, due six months after date.

Judgment was rendered against Wurtman by default. But Schuff resisted a recovery against him, alleging in his answer that he was only the surety of Wurtman in the note, and that on the 22d of May, 1867, when the note became due, appellant, without his consent or knowledge, contracted with his principal to extend the time of payment six months for and in consideration of ten dollars as interest on said note, to be paid to him by said Wurtman within six months thereafter, which sum appellant received and did give the promised indulgence—and this arrangement, he alleges, was repeated some six or seven times, at the end of six months, and the indulgence given according to the agreement.

On the trial the law and facts were submitted to the judge, a jury having by agreement of the parties been dispensed with, who rendered judgment in favor of Schuff, and the plaintiff below has appealed.

Wurtman was the only witness examined, and he testified that he was principal in the note and appellee was his surety; that six months after the maturity of the note he paid appellant ten dollars, and he promised to wait six months longer and did wait when another ten dollars were paid and the promise to wait six months longer was revived—and this was continued for every six months up to some time before this suit was instituted. Sometimes the payments were made in money and sometimes by credit upon a running account for leather, which appellant was owing him. That none of these payments were made in advance of the six months for which they were the interest, the money payments were all made either at the expiration of the six months or after such expiration.

From the foregoing statement it is manifest that at most there was only an agreement on the part of the principal in the note to pay the appellant usurious interest some time within six months ensuing, which agreement appellant could not have enforced, the agreement not being enforceable, consequently it

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did not suspend appellant's right to sue nor the rights of any of the parties. As therefore the agreement for indulgence upon a void contract did not suspend any of the rights of the surety, he is not entitled by reason of the indulgence given to be released from his obligation to pay the note for which he bound himself with his principal. *Tudor v. Goodloe*, 1 B. Mon. 322.

Wherefore the judgment is *reversed* and the cause is remanded with directions for a new trial and for further proceedings consistent herewith.

Gibson & Son, for appellant.

I. R. Greene, for appellee.

JOHN W. SULLIVAN *v.* COMMONWEALTH.

Trial—Instructions Must be included in Bill of Exceptions.

An instruction not embraced in the bill of exceptions will not be considered by the court of Appeals.

APPEAL FROM GREEN CIRCUIT COURT.

January 6, 1872.

OPINION BY JUDGE LINDSAY:

This court cannot reverse a judgment in a penal prosecution upon the ground that the verdict is against the evidence.

The instruction complained of is not embraced in the bill of exceptions, nor identified by any order of the court.

The clerk does not even state that the two papers copied in the record purporting to be instructions are those given by the court upon the trial of this case. For these reasons we cannot disturb the decision of the circuit court.

Judgment affirmed.

John W. Lewis, for appellant.

Attorney General, for appellee.

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WILLIAM T. MCNEES AND WIFE v. WILLIAM THOMPSON.

Judgments—Pro Confesso—Imbecility as Defense.

William Thompson, in early life, was a man of ordinary business habits and was regarded in the vicinity where he lived as a prosperous and thrifty man. His affection for his wife and children was as strong and devoted as the relation of husband and parent required it should be, and in the discharge of his parental obligations he was in every way equal to the duty imposed on him. After the death of his wife and perhaps before and as early as the year 1863, it was discovered by his family physician that his mind was weakening from disease of the brain, resulting in almost entire loss of memory. After this time the affections he had had for his offspring seemed to have been no longer felt and his parental obligations to his children were no more observed. His grandchildren, who were raised in his own home were neglected and forgotten and he declared time and again without any excuse whatever, that his children should not own or enjoy any part of his estate. He then became estranged to his children and the only association he had was with the appellant. While in this condition he executed a note for a large sum, nearly half the amount of his entire estate, upon which suit was instituted, whereupon he walked into the court house and confessed judgment.

Held: That at the date of the confession of the judgment by William Thompson he was not in a condition of mind to understand and comprehend what he was doing, and that hidden influences operated for the purpose of intensifying his hatred to his own offspring resulted in the execution of the note.

APPEAL FROM HARRISON CIRCUIT COURT.

February 2, 1872.

OPINION BY JUDGE PRYOR:

On the 20th day of December, in the year 1864, William Thompson executed to Sarah L. Thompson his note for eight thousand six hundred dollars, due and payable one day thereafter.

At the May term of the Harrison circuit court, in the year 1865, Sarah L. Thompson filed her petition on this note against William Thompson, and on the same day he came into open court and confessed judgment thereon. The judgment was then entered for the amount of the note and interest. In October, 1868, a petition in equity was filed in the same court by A. L. Thompson as relator for the committee alleging that Wil-

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William Thompson, by reason of his imbecility of mind and his advanced age, was incapable of managing his estate, and had been wasting his property, etc. Upon the hearing of this petition William Thompson was adjudged to be incompetent by reason of his want of intellect to manage his estate, and Hugh M. Keller appointed his committee to take charge of and control the same. William having intermarried with W. T. McNees instituted proceedings for the purpose of enforcing the judgment against William Thompson, rendered in the year 1865 against his estate in the hands of Hugh M. Keller, his committee. Keller pleaded to these proceedings against him as committee, "that William Thompson at the time he executed the note to Mrs. McNees (then Mrs. Thompson) was so imbecile in mind as to render him incapable of contracting or managing his own business affairs; that he was also in this same condition of mind at the rendition of the judgment upon the note." He further alleges that the note and judgment was obtained by the fraud and undue influence of Mrs. McNees. Whilst this controversy was pending, the committee Keller filed his petition in equity to subject to the payment of the purchase money a house and lot in Cynthiana, sold by William Thompson to Mrs. McNees. McNees and wife filed an answer and cross-petition in this case, in which they plead as a set-off this judgment obtained in 1865, or a sufficiency thereof to satisfy the debt due Keller as committee, and asks that the balance of the judgment be satisfied out of the estate of Thompson, then in Keller's possession and control. Keller, in response to this cross-petition, again alleges the imbecility of mind on the part of Thompson at the time he executed the note, and confessed the judgment, also the fraud and undue influence on the part of Mrs. McNees in both the note and judgment, and asks that the note be canceled and the judgment vacated, etc. Upon the hearing of the cause the note and judgment were both annulled by the court below, and from that judgment McNees and wife have appealed to this court.

The testimony shows that William Thompson in early life was a man of ordinary business habits, and from the circumstances surrounding him was regarded in the vicinity where he lived as one of the most prosperous and thrifty men in it.

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His affection for his wife and children was as strong and devoted as the relation of husband and parent require that it should be, and in the discharge of his parental obligations he was in every way equal to the duty imposed upon him. After the death of his wife, and perhaps before, and as early as the year 1863, it was discovered by his family physician, who had known him long as a physician and friend, that his mind was being weakened by a disease of the brain, resulting in almost the entire loss of memory and the failure upon his part to recognize his most intimate friends, and even his own children.

His daughter, who had grown from infancy to womanhood under his own roof, as far back as the year 1863, had to convince him by argument that she was really his daughter. The affection he had for his own offspring from the period alluded to seems to have been no longer felt, and his parental obligations to his children were no more observed than if they were never.

The children of his daughter, Mrs. January, after her death, who had been partly raised in his own home, were neglected and forgotten and declarations made by him time and again as if it was his fixed purpose never to permit any of his children to enjoy or own any part of his estate. Nothing appears in this record upon which to base a conclusion that he had even the most remote cause for disinheriting his own children, and certainly nothing to drive from his bosom that parental feeling characterizing all his actions and conduct in the days of his mental vigor and manhood.

From the sober, steady business man he became the jest of the boys in the street, and seems to have been trifled with in his misfortune as one destitute of both feeling and intellect.

This condition of mind is proven by several witnesses to have existed from the year 1863 up to 1868, until by the judgment of the Harrison circuit court his estate was taken from him and placed in the hands of a committee.

The appellant introduced proof showing that between the execution of the note in 1864 and the year 1868, when this committee was appointed, that William Thompson made several advantageous sales of real estate, engaged in business pursuits and conducted a law suit with judgment and discretion, and that

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in their opinion he was of sound mind and fully competent to contract.

This testimony, however, is confined to the statements of only two witnesses who profess to have been on intimate personal relations with him. That these sales were made, there can be no doubt, and that they evidenced in the absence of any other proof the existence of a mind competent to contract is equally certain. It is a little remarkable that of all the neighbors of William Thompson living as he did for nearly half a century in the midst of a thrifty and intelligent people, that but two witnesses who had been upon intimate terms with him testify as to his mental capacity, and one of those the father of the appellant.

The consideration for the execution of this note is based upon the following facts: McCauly Thompson, a son of William Thompson, was the first husband of Mrs. McNees and had by him one child. Robert Jones, shortly after the marriage of McCauly Thompson with his daughter, conveyed to his son-in-law a house and lot in Cincinnati. Thompson, the son-in-law, died, and a child by their marriage died shortly afterwards. By the law of Ohio the estate passed by descent from the child (dying under age) to the brothers and sisters of McCauly Thompson, and the appellants now say that William Thompson, learning that his children were about to assert claim to this Cincinnati property, disclosed his intention if they did so to fully indemnify Mrs. Nees (then Thompson), and in order to do so executed this note for eighty-six hundred dollars.

His children asserted claim to that property, and, although there was no legal or moral obligation upon William Thompson to indemnify his daughter-in-law, still if upon this consideration, and when capable of understanding what he was doing, and without any undue or improper influence exercised over him by others, he executed the note in controversy his estate must pay it.

Robert Jones and his daughter-in-law lived near and adjoining William Thompson. After he became isolated from his personal friends and estranged from his children the only associations he had were with the appellant, Mrs. McNees, and her father.

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Robert Jones seems to have been his confidential advisor. His safe was the depository for his (Thompson's) money and papers, and Jones, even in making to Thompson a payment on property purchased from him, counted out the money in the presence of the clerk, Thompson entirely oblivious as to what was going on; and after the money was counted, instead of giving it to Thompson, Jones took it from the counter or clerk and Thompson followed along after him, the former saying that he was going to place it in bank.

All such confidential relations existed between Thompson and Jones, and so far as this record shows, Thompson reposed confidence in no one else. It is proven that the note in controversy was written by W. W. Trimble, and that another writing was entered into at the same time. What this last writing contained does not appear. Who called upon the draftsman to prepare the writings is not shown in this record.

When these writings were signed by William Thompson, who was present at the time, and what transpired between the parties is all unexplained. How Robert Jones came into the possession of the note is not known. All the circumstances usually attending a transaction of such importance is left involved in mystery, and the first time the note is seen in the presence of any one is when Robert Jones has it at his store and calls upon young Givens to attest it. The circumstances attending such a transaction between those whose minds enable them to transact the ordinary business affairs of life need no explanation, but where the facts exist that create a strong suspicion in the mind of the chancellor that the intellect of one who is sought to be made liable was impaired by disease or old age at the time of the creation of the liability, it devolves upon the party seeking to enforce such a claim to remove this suspicion when the proof, if it exists, must be within his reach. Givens enters the store house of Jones, attests this note at Jones' instance, and not one word is said to William Thompson, and no word spoken by him. This note is not again seen until nearly a year after the attestation by Givens, when Jones hands it to a lawyer with directions to prepare a suit upon it (court then being in session) and that William Thompson would appear in court and confess judgment. Thompson did appear in court, and in his own person

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confessed judgment for this note equal in amount to nearly the value of one-half his estate. Thompson is a silent actor in all the mystery connected with the execution of this note until he enters the court room, and by this confession of judgment subjects his estate to sale for this large sum under execution. No consultation in regard to the assumption of this responsibility is had by Thompson with any one, and if influenced to execute the note by his ideas of justice, and with a judgment that alone controlled his action, it is very strange that upon his return to reason it did not occur to him that his own children, and if not them, his grandchildren, had some claim upon his bounty or enable him to recall at least the oft repeated declaration made by him that he intended to disinherit them all. This unnatural and insane purpose entertained without a cause seems never to have been abandoned by him so far as this record shows. This insane aversion to his children originated prior to the claim set up by them to the Cincinnati property. It was the result of a deranged mind produced by disease of the brain and hastened in its progress by reason of his advanced age. The evidence in this case upon the question of capacity alone conduces strongly to show that at the date of the note in controversy and at the date of the confession of the judgment by William Thompson, he was not in a condition of mind to understand and comprehend what he was doing, and we are further satisfied that with an intellect weakening day by day, hidden influences, the existence of which is now and then made to appear by the proof in the cause, operated upon William Thompson to an extent that controlled and moulded his will for purposes that aided to intensify his hatred to his own offspring and resulting in the execution of this note for \$8,600 in the year 1864 and the confession of judgment upon it in 1865.

The judgment of the court below is affirmed.

Trimble, for appellant.

Ward, Cleary, for appellee.

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WILLIS MORTON v. W. C. MORRIS.

Attorney and Client—Professional Confidence—Communications.

On the trial, A. S. Berry was offered as a witness by the plaintiff below, who proved that within five years the defendant came to him and said he wished him to fix up the title to some land in Indiana as he wanted to pay the plaintiff some money he had advanced to him to start him in the saloon business, that he was indebted to plaintiff for money advanced to him and that he would pay him in land. He also stated that he acted as attorney for appellant and expected to charge him.

Held: That in determining the question, it is necessary to ascertain what is the legal meaning of secret or confidential communications between attorney and client and they are defined to be instructions given for conducting a cause and not any extraneous or impertinent communications. The business of the attorney was to fix up the title to some land in Indiana and the statement that he wished the land to secure the debt to appellee, had no particular relation to the business to be transacted and constituted no part of the instructions necessary to the performance of the professional duty in which Berry was engaged. It was a mere *gratis dictum* which Berry was under no obligation to keep secret in his character of attorney.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 18, 1872.

OPINION BY JUDGE PETERS:

This suit was brought by appellee against appellant to recover \$440. A sum which appellee alleges he had previously loaned appellant.

On the trial A. S. Berry was offered as a witness by the plaintiff below, who proved that within five years the defendant (below) came to him and said he wished him to fix up the title to some land in Indiana, as he wanted it to pay the plaintiff some money he had advanced to him to start him in the saloon business, that he was indebted to plaintiff for money advanced to him. \$300, \$400 or \$500, he did not remember which sum certainly, but believed, he said, about \$400, and he would pay him in land. He also stated he acted as attorney for Morton and expected to charge him.

Appellant then moved the court to exclude the evidence of Berry from the jury, which motion the court overruled. And

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the correctness of that ruling of the court is called in question by this appeal.

And it is insisted by appellant that the witness should not have been permitted to prove the communications made to him by appellant, because they were the confidential communications to his attorney by appellant, which are privileged communications.

The rule of law is recognized that a counsel, solicitor or attorney will not be permitted to divulge any matter which has been communicated to him in professional confidence. This, as is said by Starke 2, Vol. 395, is the privilege of the client, and is founded on the policy of the law, which will not permit a person to betray a secret which the law has intrusted to him.

But in determining the question, it is necessary to ascertain what is the legal meaning of secret or confidential communications between attorney and client.

They are defined by Chancellor Kent to be instructions given for conducting a cause, and not for any extraneous or impertinent communications. In this case appellant had no cause in court, nor had the facts proved any pertinency to the business which Berry as attorney was engaged to transact for appellant. The business of the attorney was to fix up the title to some lands in Indiana, and the statement that he wished the land to secure the debt to appellee had no particular relation to the business to be transacted and constituted no part of the instructions necessary to the performance of the professional duty in which Berry was engaged. In the language of Lord Kenyon, it was a mere *gratis dictum* which Berry was under no obligation to keep secret in his character of attorney.

The ruling in this case accords with the opinion of Chancellor Kent in *Riggs v. Denniston*, 3 John; cases 198.

Perceiving no error prejudicial to appellant the judgment must be *affirmed*.

Hawkins & Boden, for appellant.

J. R. Hallam, for appellee.

Opinion of the Court.

NANCY SMITH *v.* HENRY DRESSMAN.**Contract—Compensation for Unfinished Work.**

Where a contractor fails to complete a house his compensation therefor should be the actual value of the house to the owner in its incomplete condition.

APPEAL FROM KENTON CIRCUIT COURT.

January 18, 1872.

OPINION BY JUDGE PETERS:

We are satisfied from the evidence in this case that the house erected on the grounds of appellant by appellee was not built either in workmanship or materials according to the spirit and meaning of the contract between the parties. But we have not the time to enter upon an analysis of the evidence to determine whether the amount paid by appellant is as much as appellee reasonably deserves to have for the work and materials, or whether appellant has been profited more than the materials on her lot are reasonably worth. We, therefore, are constrained to reverse the judgment and remand the cause with directions to the court below to refer the case to the master to ascertain and report the value of the building erected on appellant's lot by appellee, its present condition and the condition it was in when appellee left it, and the difference between its value when appellee ceased to work on it and its value if it had been completed in workmanlike style.

Stevenson, Myers & Richardson, for appellant.

C. H. Mooar, for appellee.

C. J. SELDON *v.* THOMAS W. BULLITT, ETC.**Clerks of Courts—Copying Record Fees—Record Confused.**

Where a record is much confused by the interlineation of the orders out of their proper place, and without any regard to the order in which the proceedings were had, the clerk is not entitled to charge any fee therefor.

Opinion of the Court.

APPEAL FROM LOUISVILLE CHANCERY CIRCUIT COURT.

February 17, 1872.

OPINION BY JUDGE PRYOR:

It is evident from the facts in this record that the appellee Bullitt should not be compelled to pay this debt twice to Mrs. Maguire or her assignees. The parties at his instance were compelled to interplead in order to determine their respective rights to the monies in his hands. Seldon and McDonald both assert their right to this judgment, or its amount in the hands of Bullitt. Bullitt is ready to pay the money to either one of the parties.

McDonald is not precluded from asserting his right to the judgment as he was no party to the suit instituted by Seldon. This is not a suit by Bullitt to vacate the judgment, but is in fact a suit by McDonald against Seldon claiming the amount of the judgment against Bullitt.

It is true that McDonald and Seldon get into court upon Bullitt's cross-petition filed after judgment, but after they are brought into court the controversy is really between them. The chancellor had jurisdiction to determine the rights of these parties to the money in Bullitt's hands. He has adjudged that it belongs to McDonald for the reason that Seldon, after his right to the money in Bullitt's hands, had tacitly consented to the transfer of this very money or the right to it to McDonald. Although the judgment had been rendered against Bullitt, there was nothing to prevent McDonald from asserting claim to it by reason of the assignment to him by Mrs. Naygin, and as the rights of McDonald and Seldon have been settled by a court having jurisdiction certainly as between these parties, McDonald and Seldon, we are not disposed to disturb the judgment. The judgment of the court below is affirmed. The record in this case is so much confused by the interlining of orders out of their proper place and without any regard to the order in which the proceedings were had that the clerk below is directed not to take any fee against either party for the services rendered by him in making the same out.

L. A. Wood, for appellant.

Bullitt & Bullitt, Harris, Ward, for appellees.

Opinion of the Court.

J. L. C. MATHEWS v. J. T. MURPHY.

J. L. C. MATHEWS v. J. W. BOWSER.

**Fraudulent Conveyances—Husband and Wife—Increase of Wife's Estate
From the Proceeds of Husband's Labor is Subject to Attachment.**

A husband has the right to secure to his wife and family a home when it is not done at the expense of his creditors, but he can not add to his wife's estate by his labor and thereby increase her estate regardless of the claims of his creditors.

APPEAL FROM JEFFERSON CIRCUIT COURT.

February 7, 1872.

OPINION BY JUDGE PRYOR:

The court below upon the testimony adduced very properly sustained the attachments. Mathews had evidently been engaged in speculative operations in which he had wrecked his fortune. The effort upon his part to secure to his wife and family a home when not involved is to be regarded in any other light than as fraudulent. It was his duty to do so when not at the expense of his creditors. The conveyance to his wife by Morris was not fraudulent as to the appellees, whose debts originated long after the conveyance was made. The appellees, however, are not attacking the conveyances to the wife as fraudulent, or making any effort to subject the wife's property to the payment of their debts. The subsequent sales and conveyances by the husband and his wife of this property, and the effort upon the part of the appellant to increase the value of his wife's estate by or from the proceeds of his own labor, connected with his embarrassed pecuniary condition, was enough to induce a vigilant creditor to look to the security of his claims against him. His wife's estate had increased in value from February, 1870, until July, 1870, nearly ten thousand dollars. This increase had originated from personal liabilities incurred by the husband. In August, 1871, he again sold his wife's estate, or exchanged it for a large tract of land in Bullitt County, including horses, cattle, hogs, etc. This was shortly after the execution of the notes to the appellees. What was the value of this property in Bullitt County does not appear, but enough

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is shown from the proof in the record to satisfy the mind of the chancellor that the object of the appellant was to add to his wife's estate by his own means and credit, regardless of the claims of creditors.

His liabilities were certainly increasing and his means of paying diminishing, and the result of his speculations and the management of his business affairs was the deed of assignment, made a few hours after appellee's attachments were obtained, for the benefit of his creditors. The property of appellant, valued at thirty thousand dollars or more in the year 1867, is all gone in 1871 with scarcely anything for creditors, and the wife in possession of an estate worth fifteen or twenty thousand dollars. Whilst we do not mean to say that the conveyance to the wife was fraudulent as to the creditors, we are of the opinion that the conduct of the husband before and after the conveyance by Morris was sufficient to arouse the suspicion of the creditors, and their efforts to secure their debts are fully sustained by the facts in the record. Judgment affirmed.

Barr, Goodloe & Humphrey, for appellant.

Stratton, Needham, for appellee.

THOS. B. MATTINGLY *v.* LOUISVILLE & NASHVILLE RAILROAD CO.**New Trial—Presiding Judge Dies Pending Motion—New Trial Granted by Successor.**

The judge who presided over the trial having died without disposing of the motion for a new trial, his successor granted it without any knowledge of the evidence adduced on the trial, or of the rulings or instructions of the court and a verdict and judgment was rendered for the defendant on the second trial.

Held, that reasonable and fair presumption should be indulged in, in favor of the correctness of both the finding of the jury, and the action of the court in supervising the trial; and the general rule seems to be that a new trial ought not to be granted without such knowledge or information as will enable the court to exercise a sound judicial discretion in determining the question involved; which information can be brought to the mind of the judge by competent evidence.

APPEAL FROM MARION CIRCUIT COURT.

January 23, 1872.

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OPINION BY JUDGE HARDIN :

This action was twice tried in the circuit court. The first trial resulting in a verdict and judgment for the plaintiff for the sum of \$125—and the judge who presided over the trial having died, without disposing of a motion, which was made by the defendant for a new trial, his successor granted a new trial, as appears in the record, without considering or ever having any knowledge of the evidence adduced on the trial, or of the rulings or instructions of the court; and a verdict and judgment having been rendered for the defendant on the second trial, the plaintiff has appealed to this court; and his counsel relies mainly for a reversal on the ground that the court erred in setting aside the first judgment without any knowledge of the grounds upon which the motion for a new trial was based.

In the absence of any evidence conducing to a contrary conclusion every reasonable and fair presumption should be indulged in favor of the correctness of both the finding of the jury and the action of the court in supervising the trial and the general rule seems to be that a new trial ought not to be granted without such knowledge or information and consideration by the court of the ground of complaint against the judgment, as will enable the court to exercise a sound judicial discretion in determining the questions involved; which knowledge or information could have been brought to the mind of the judge in this case by an enquiry as to what occurred on the trial, and such an enquiry should, if asked, have been allowed to the party seeking to vacate the judgment (*Graham & Waterman on New Trials*, pages 596 to 599).

For the error indicated the judgment is reversed and the cause remanded with directions to allow the defendant, if it shall ask to be permitted to do so, to establish by any competent evidence the facts which transpired on the former trial in passing on the motion for a new trial.

W. B. Harrison, for appellant.

Noble, for appellee.

C. J. SPILLMAN v. COMMONWEALTH.**Bail—Forfeiture—Reversal—Bond Taken Before Mandate Filed—County Judge Has no Authority to Take.**

After appellant's case was reversed and before the mandate of the Court of Appeals was filed the county judge admitted the defendant to bail which he forfeited, and this action was instituted against his bondsman for the purpose of collecting the amount of the bond.

Held: That after conviction a defendant can not be admitted to bail. The county judge had no authority to admit the defendant to bail, although the judgment against him had been reversed. The mandate should have been entered and the court rendering a judgment could alone discharge the prisoner from custody. The bond taken by the county judge was unauthorized and void.

Bail—Clerk May Take Bond.

After the accused has been committed and there has been a term of the circuit court, the clerk of that court, in the absence of the judge, may take bail, and where there is a commitment by the court and the amount of bail is fixed the clerk may take the bail in the absence of the judge.

APPEAL FROM WASHINGTON CIRCUIT COURT.

January 14, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

Although the record in this case is most unskillfully made out, it nevertheless appears that one Edgington had been indicted, tried and convicted in the court below for maliciously shooting and wounding an individual—after his conviction an appeal was allowed and the judgment of conviction reversed by this court—after that and before the mandate of this court was entered in the court below and while said Edgington was confined in jail under said judgment of conviction, the judge of the county court caused him to be brought before him by writ of habeas corpus and admitted him to bail in the penalty of \$500 for his appearance in the Washington circuit court on the 2d day of its September term, 1870, to answer the charge against him and with the other stipulations prescribed by law. He failed to appear in discharge of his recognizance, and thereupon

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the same was adjudged forfeited. Appellant, being one of his sureties, appeared and moved the court to quash the recognition, and his motion having been overruled and judgment rendered against him for the penalty he prosecutes this appeal.

By *Sec. 71, Cri. Co.*, it is provided that after conviction a defendant cannot be admitted to bail. The county judge had no legal authority to admit Edgington to bail although the judgment against him had been reversed. The mandate of this court should have been entered and the court rendering the judgment could alone discharge the prisoner from custody.

Moreover, the amendment to *Section 61 of Criminal Code* provides that after the accused has been committed and after there has been a term of the circuit court, the clerk of the court, in the absence of the judge, may take bail of the accused, and whenever there is a commitment by the court, and the amount of bail is fixed, in such cases the clerk of the circuit court may take the bail in the absence of the judge.

It is clear therefore that the county judge had no authority to admit the said Edgington to bail, and the bond taken by him was unauthorized and void.

Wherefore the judgment is reversed and the cause is remanded with directions to sustain appellant's motion and quash said bond.

J. B. Thompson, Sr., for appellant.

Thurman, for appellee.

JOHN J. SPIERS, ETC., v. HENRY AMENT'S EXECUTOR.

Wills—Construction—Directions to Executor to Sell Land in Parcels is Directory and Not Mandatory.

"I desire that the perishable part of my estate be immediately sold after my decease and also my real estate (the farm on which I now live) but I desire it to be divided in three parts best suited for a farm in each part, and sold separately, but if this can not be done then I desire it to be sold altogether."

Held: That the provisions in the will to divide the land in three parts before selling was merely directory and the executor had the power to use his discretion in that regard.

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APPEAL FROM HARDIN CIRCUIT COURT.

January 21, 1872.

OPINION BY JUDGE PRYOR:

Henry Ament died in the county of Hardin leaving a last will and testament that was duly admitted to probate by the county court of that county. This will contains the following provisions: First, "I desire that the perishable part of my estate be immediately sold after my decease and also my real estate (the farm on which I now live), but I desire it to be divided in three parts, best suited for a farm in each part, and sold separately, but if this cannot be done then I desire it to be sold altogether, and out of the monies arising therefrom I desire that all of my honest debts and funeral expenses be paid," and lastly he appoints N. P. Williams executor of the will, giving him the "right and power to make a deed of conveyance of all my real estate, and he is to qualify and proceed immediately after my decease to dispose of my estate agreeable of this will." These are the only provisions of the will necessary to present for the purpose of determining the question involved in this controversy. The executor, N. P. Williams, sold the land to the appellants and upon their failure to pay the purchase money instituted an action at law upon these several notes. The appellants filed their several answers to this suit containing various defenses in separate paragraphs. The principal ground of defense is that the will of Ament directed the executor to sell the land of the deviser in three different lots or parcels by dividing it into three parts for that purpose, and if that could not be done to sell the whole tract; that the land was susceptible of division as desired by the deviser, but the executor disregarding the provision of the will failed to have the land divided and sold in lots, but sold the whole tract to the appellants and they have appealed to this court. The paragraph of the answer here quoted presents no available defense to the action; the executor was vested by this provision of the will, in regard to the sale of the land, with a discretionary power to sell the whole tract or divide it in three parcels. The deviser desired that the land should be divided and sold in three lots, if it could be done, and if not, that the whole tract should be sold.

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By this clause of the will the executor was compelled to sell the land of the devisor, and this sale must be in parcels or as a whole. The mode of selling it is left entirely within the discretion of the person appointed to execute the power. The mere desire on the part of the devisor to sell is not to be construed as mandatory, but merely advisory. No one but the executor had the right to determine as to the best method of selling the land in order that its full value might be realized. This court has decided that where an executor is authorized to sell land if necessary for the payment of debts that the executor under such a power is the sole judge of the necessity for selling, and that the sale passed the title to the purchaser although there was no deficiency of assets. *Coleman v. King*, 3 J. J. Marshall 251.

The issue the appellants made in this case is that the devise expressed by the devisor in his will to sell his land in parcels could have been carried into effect, and that their judgment and those of others must be allowed to control this question.

The devisor had entrusted the executor with this power; he had imposed in him a confidence that left the executor free to sell this land in such a manner, and upon such terms as in his discretion he thought best. There was no limitation or restriction placed upon this discretion by the terms of the will, and if the executor has abused the confidence thus reposed in him by the devisor he is liable to the devisees or those interested for the violation of this trust. The purchaser of this land cannot be affected when such discretionary power is given unless there is some combination between him and the executor by which a fraud is practiced upon the devisees. The appellants have not been required by the judgment of the court below to pay for more land than they acquired title for.

The title is complete to three hundred and three-fourths acres out of three hundred and thirty-five acres sold, and this deficit will not authorize a rescission of the contract.

The notes of John Spiers and John Ament were delivered to the executor with an unconditional promise to pay these notes and delivered by the payors themselves, and the effort made to show that William Spiers' name was to be placed on the notes is not sustained by the proof, but indicates a disposition to avoid

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the contract upon a mere sham defense. This parol condition should not be permitted to render a nullity such a contract as this. It is inconsistent with the written obligations of the parties. *Hubble v. Murphy, 1 Duvall 279.*

We perceive no substantial error to appellant's prejudice by the judgment rendered and that judgment is affirmed both on the original and cross-appeal.

Wintersmith, for appellant.

Cofer, Sweeney & Stewart, for appellee.

BENJAMIN SPALDING'S EXECUTOR *v.* ELIZABETH SPALDING.

Wills—Construction.

This suit was brought to have a proper construction of the will of B. Spalding and to ascertain definitely the amount the widow is entitled to under the will. The provisions of which bearing on this particular question are as follows:

"First: My just debts must all be paid; and second, I will to my wife Elizabeth and her heirs forever, the one half of my entire estate."

Held: That the widow was entitled under the will to one-half of the entire estate after deducting therefrom the debts of the testator.

APPEAL FROM MARION CIRCUIT COURT.

January 21, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

This suit is brought to have a proper construction of the will of the late B. Spalding, or to ascertain definitely the amount the widow is entitled to under the will, the provisions of which bearing on this particular question are as follows: *First*, my just debts must all be paid; and *second*, I will to my wife, Elizabeth Spalding, to her and her heirs forever the one-half of my entire estate. She is to have the home plantation, including houses, household furniture, kitchen furniture and farming utensils, and all my stock of the farm at the price of twenty-two thousand five hundred dollars. As I estimate my entire estate at one hundred thousand dollars, including my home plantation, furniture, etc. There are about 325 acres in the tract, and my wife

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is to have that much in the plantation towards making up her half, and the balance of her half, say twenty-seven thousand five hundred dollars, to be made up out of my other estate, money, stocks, etc.

In the *third*, *fourth* and *fifth* clauses he made specific bequests, to certain persons, some of which are for charitable uses. And in the *sixth* clause he makes the following declaration and provision, in relation to the devise to his wife: If my estate falls short of one hundred thousand, my estimate, my wife of course will get less, or if more she will get more. She is to have half; and to have the home plantation, as before named, with stock, etc., at \$22,500, in part of her half.

In the seventh clause, after providing for the indemnity of his nephew, Sam Spalding, for the loss of about \$225, which he sustained by the purchase of some slaves, which the testator believed he induced him to make, he says: "I do not want to make any other special provisions, therefore leave the balance for my heirs," and after nominating his executors and executrix, he says they may sell and convey his "unwilled" real estate.

The court below adjudged that the widow was entitled under the will to the one entire half of the estate of testator undiminished by debts owing by him at the time of his death, and the costs and expenses incident to the administering and settlement of the estate, and from that judgment this appeal is prosecuted.

Having estimated his estate to be worth one hundred thousand dollars, and valuing his home farm, stock, furniture, etc., at \$22,500, which his wife was to have in any event, the testator directed that she should have \$27,500, made up to her out of the residue so as to make the half of a hundred thousand.

But regarding it as somewhat uncertain whether his estate would reach the estimate he had put on it, he says if it falls short of that estimate, his wife, of course, will get less; or if more she will get more. The fact whether his estimate was correct, or whether his estate would fall short of, or exceed that estimate, were to be ascertained when the time came for payment of the legacy; the testator had not definitely fixed it. And how was the true value of his estate to be ascertained? Not alone by ascertaining whether the testator had been deceived in the valuation he put on his estate, or in the quantity of it, but

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by ascertaining the amount of his debts, also, and he could not have intended to have excluded his debts when he declared that if it fell short of his estimate his wife would, of course, get less.

Nor can the words, "entire estate," used in the second clause, enlarge the devise to the wife. On the other hand, even if their words were entitled to the controlling influence contended for, the explanatory words of the sixth clause would restrict them, and limit the devise to the wife to one-half of the estate after the payment of debts. In this view of the case it can make no difference to appellee whether the persons denominated by testator as his heirs, take the residue of the estate as heirs, or as devisees, as her portion is the one-half after the payment of the debts of testator, and the costs of administration.

Wherefore, the judgment of the circuit court is reversed, and the cause is remanded with directions to render judgment as herein indicated for further proceedings consistent herewith.

Harrison, for appellant.

Lisle, Noble, for appellee.

NEWPORT & DAYTON T. P. CO. v. CONRAD HAHN, ETC.

Pleadings—Answer Made no Issue—Cross-Petition.

If no reply had been filed and a jury impaneled to inquire into the amount appellants were entitled to recover upon the counter-claim relied on, no evidence would have been admissible to show damage on account of the unscreened gravel, nor could a verdict have included liquidated damages as the answer and counter-claim did not raise the issue.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 12, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

Appellees, after setting out the terms of this contract with the turnpike company, allege that they had built the company's road from Tyler's creek bridge to Dayton under the supervision and instruction of their engineer; that the work amounted to

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\$6,924.62; that there had been paid to them \$4,343, leaving due and unpaid a balance of \$2,581.62, for which amount they prayed judgment.

Appellant denied that the work had been done according to contract, or that it had been received as completed. They denied that the work amounted to a greater sum than \$5,743. They denied that the road was completed by the 1st of December, 1869, or that it was complete at the time that answer was filed.

They pointed out several defects as to fills, grading and drainage, and that portions of the road had been left without gravel. They claimed in general terms damages for \$2,500.

Upon the trial no instructions touching the defenses relied on in the answer were asked for, and under the evidence the jury did not commit a palpable error in disregarding them.

Appellants insist, however, that they should have been allowed a set-off in a large amount on account of the appellee's using unscreened gravel on portions of the road instead of screened gravel as prescribed by contract. Also that by the contract they were entitled to liquidated damages at the rate of five dollars per day from the 1st of December, 1869, until the road was completed.

Neither of these alleged violations of appellee's contract are set up and relied on or even referred to in appellant's answer. If no reply had been filed it could not have been taken as confessed, in so far as these are concerned.

If no reply had been filed and a jury impaneled to inquire into the amount appellants were entitled to recover upon the counterclaim relied on, no evidence would have been admissible to show damages, on account of unscreened gravel having been used in a construction of the road, nor could a verdict have included these liquidated damages until the pleadings set out the number of days for which such damages were claimed. It is not necessary to determine whether or not the jury disregarded the instructions of the court.

Under the pleadings the verdict was correct, and the circuit judge properly overruled the motion for a new trial.

Judgment affirmed.

Hallam, Carlisle, for appellant.

Baker, Hawkins, for appellee.

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JOHN D. SECREST *v.* A. SANDFORD, ET AL.

Descent and Distribution—Advancements—Debt.

In the distribution of a decedent's estate it is immaterial whether the amount charged against a child was regarded as an advancement or a debt.

APPEAL FROM FLEMING CIRCUIT COURT.

March 5, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

The report of the master and the judgment are sustained by a preponderance of the evidence. The money paid Thomas by his parents, whether regarded as an advancement or as a debt from him, was properly a charge against him, and until his brothers and sisters had received an equal amount, he nor his vendee should be permitted to participate in the effects to be distributed.

Perceiving, therefore, no error in the judgment, the same is *affirmed*.

Cole, for appellant.

Cord, for appellee.

SAMUEL SMITH *v.* JOHN NORRIS' HEIRS.

Executors and Administrators—Administrator de bonis non—Personal Judgment Against.

Samuel Smith was the administrator of John Norris, deceased, and as such disposed of nearly all of his personal effects. Smith, before making any settlement of his accounts as administrator, died and his son, Samuel V. Smith, was appointed his administrator, and was also appointed administrator de bonis non of John Norris. Suit was brought by the children of John Norris, deceased, against the appellant for a settlement of the estate of John Norris so far as it passed into the hands of his intestate, and also of the estate that appellant took into possession as administrator de bonis non. The court below charged the appellant with all the monies and value of property that passed to his intestate as administrator of Norris and rendered a personal judgment against him for the whole amount.

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Held, that as there is no devastavit and no effort ever made so far as the record shows to have a settlement with appellant until this suit was brought, the judgment should have been against the appellant as the administrator of his father to be levied of assets in his hands as such.

APPEAL FROM LARUE CIRCUIT COURT.

January 13, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

Samuel Smith was the administrator of John Norris, deceased, and, as such, disposed of nearly all his personal effects. Smith, before making any settlement of his accounts as administrator, died, and his son, the present appellant, Samuel V. Smith, was appointed his administrator, and was also appointed administrator *de bonis non* of John Norris. The present suit in equity was brought by the children of John Norris, deceased, against the appellant for a settlement of the estate of John Norris so far as it passed into the hands of his intestate, and also of the estate that appellant took into possession, etc., as administrator *de bonis non*. The case was referred to a commissioner who reported an indebtedness on the part of appellant's intestate as administrator of Norris for several hundred dollars. It seems that but very little, if any, property of the estate of Norris passed into the hands of the appellant as administrator *de bonis non*. The court below, however, charges the appellant with all the monies and value of property that passed to his intestate as administrator of Norris, and renders a personal judgment against the appellant for the whole amount. There is no devastavit and no effort ever made so far as this record shows to have a settlement with the appellant until this suit was brought. The judgment should have been against the appellant as the administrator of his father, Samuel Smith, to be levied of assets in his hands as such. Exceptions were filed by both the appellant and the appellees to the commissioner's report and some of these exceptions should have been sustained by the court below. The grandfather of Norris' children, who was appellant's intestate, should not have been allowed anything for the support, clothing, etc., of Norris' children. Other parties were willing to take these children and care for them without reward, but the old man

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feeling the natural obligation upon him took them to his own home and with no intention or design of charging them, and the charge made therefor of the appellant should not have been allowed. The negro woman that went with the children to the home of Samuel Smith was employed doubtless in aiding to take care of these children and the value of her hire, either whilst there or when hired to others, should not be charged against Samuel Smith's estate, largely more than the proceeds of the hire was expended by him for the benefit of these children. Nor could Smith's estate be charged with the provisions and other articles that he removed from the home of Norris and failed to sell, as the children, no doubt, got the benefit of them or an equivalent therefor. The claim for rents against Norris' estate was properly reported. The court very properly refused to dismiss the petition for want of a demand and affidavit. For the reasons herein indicated the judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Read & Twyman, for appellant.

Gore, for appellee.

 MOLLIE MILLS v. COMMONWEALTH.

Indictment—Lascivious Indulgence.

It is unnecessary to allege in an indictment for lascivious indulgence that the defendant procured evil disposed persons to meet together if she keeps a house for such purpose and permits such practices.

APPEAL FROM McCRACKEN CIRCUIT COURT.

January 9, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

Every material fact necessary to constitute the offense charged is alleged in the indictment. It would be wholly unnecessary to allege that appellant *procured* evil disposed persons to meet together for lascivious indulgences, if she kept a house for

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such purpose and permitted such practices therein she was guilty of the offense. Perceiving no valid objection to the indictment the demurrer to it was properly overruled, and the judgment must be *affirmed*.

Bidwell, for appellant.

T. T. MCGUIRE v. L. P. LORIAN.

Contracts—Breach—Measure of Damages—Instructions.

The twelfth instruction given to the jury placed no limit upon the amount they could assess as damages. They are told, in assessing the damages, they may find in any amount that in the exercise of a sound discretion they may think the plaintiff was damaged.

Held, that there can be no objection to the latter part of the instructions, but when taken in connection with the former part it conveys to the jury the idea that they have the right to find other than actual damages which is erroneous.

APPEAL FROM MCCrackEN CIRCUIT COURT.

March 16, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

The evidence in this case did not authorize the verdict or judgment rendered, and the instruction, No. 12, given at the instance of appellee's counsel was calculated to mislead the jury. The plaintiff, in an action like this, can only recover the actual damages resulting from the breach of the contract by the defendant. Conceding the breach of the contract to have been established by the proof (and this we do not decide), and allowing to the plaintiff the amount of the expenditures incurred by him in removing to and from the farm of the appellant, the verdict should not have exceeded fifty or sixty dollars. The board and provisions furnished the appellee by the appellant as far as the testimony in the record shows, was ample compensation for the services rendered by him, and if not giving him a reasonable sum for his labor the whole amount of damage should not exceed \$175.00. The twelfth instruction given to the jury places no limit upon the amount the jury could assess as damages. They

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are told in assessing the damages they may find in any amount that in the exercise of a sound discretion they may think the plaintiff was damaged, and that in estimating the damages they may take into consideration the time lost, and labor and expenses of Lorian in removing to and from the appellant's farm. There can be no objection to the latter part of this instruction, but when taken into connection with the former part of the instruction it conveys to the jury the idea that they have the right to find other than the actual damages proven. They can not find punitive or vindictive damages. Nor can they speculate upon what might have been the probable loss, or profit, of the joint undertaking had it been carried out. The jury were confined to the actual damages proven and this instruction was calculated to mislead them. Wherefore for the reasons indicated the judgment of the court below is reversed and the cause remanded with directions to set aside the verdict of the jury, and award to the appellant a new trial and for further proceedings consistent herewith.

Bigger, Moss & Marshall, for appellant.

Bramlette, Durrett & B. King, for appellee.

WILLIAM McBEAN *v.* WILLIAM W. RICHEY, ETC.**Pleading—Evasive Answer.**

When an answer is silent and evasive and the proof unsatisfactory, the plaintiff is entitled to the relief sought.

APPEAL FROM McCracken Circuit Court.

March 25, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

The answers of both the Richeys and Hughes are singularly silent, and apparently evasive as to the ability of Arthur W. Richey to pay for the land; and the consideration, if any, which was paid by Hughes for the notes; and the testimony of W. W. Richey, though taken to sustain the claim of Hughes, is equally unsatisfactory on that subject. It seems almost incredible that

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if those transactions were in good faith, and especially if Hughes bought the notes and paid their value for them, though even W. W. Richey, in giving his deposition would have failed to explain how, or in what he was paid for the notes.

Upon the whole case, as presented in the record, we must conclude that the plaintiff was entitled to relief, and that the court erred in dismissing his petition.

Wherefore, the judgment is reversed and the cause remanded with directions to enter a judgment for the plaintiff.

King, J. B. Husband, for appellant.

Bullock, Bramlette, appellee.

W. H. SOWARD v. PEYTON JOHNSON.**Bills and Note—Set-Off—Beneficial Owner.**

If Wings Johnson was the beneficial owner of the note sued on, such fact would have authorized the note held by Soward against him to be set off against it, even in the hands of the appellee.

APPEAL FROM PIKE CIRCUIT COURT.

February 6, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The answer of Soward presented no sufficient reason for making Wings Johnson a party to this action.

If in point of fact he was the beneficial owner of the note sued on, proof that such was the case would have authorized the note held by Soward against him to be set off against it, even in the hands of the appellees. The proof failed to sustain this hypothesis, and the verdict in favor of the appellee was therefore correct.

Perceiving no error in the action of the circuit court as to the law of the case the judgment must be *affirmed*.

Rodman, for appellant.

Apperson & Reed, for appellee.

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J. M. SHOTWELL *v.* ELLIS J. YELTON.

Trials—Oral Instructions.

The court of appeals will not reverse on account of oral instruction where neither side objects.

APPEAL FROM KENTON CIRCUIT COURT.

January 17, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The oral instruction given by the court to the jury was not objected to by either party when given.

The verdict of the jury cannot be said to be palpably against the weight of the evidence.

The evidence does not very clearly establish the specific contract sued on, nor the amount realized from the products of appellant's forty acres of land during the year of 1869, but neither of these allegations are specifically denied by him.

We do not feel authorized to disturb the finding of the jury.

Judgment *affirmed*.

Handy, for appellant.

Richardson, for appellee.

DAVID SNIDER, ETC., *v.* JOHN RANCHBUSH.

Alteration of Instruments—Presumption—Burden of Proof.

Where it is apparent upon the face of a note that it has been changed since its execution, it will be presumed that the alteration was made without the consent of the obligor, and the burden of proof is on the holder to establish the fact that it was made by the obligor or with his consent.

APPEAL FROM BRECKENRIDGE CIRCUIT COURT.

March 6, 1872.

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OPINION OF THE COURT BY JUDGE HARDIN:

It does not appear to us that the appellants established any valid cause of action on their counterclaim, and there was no error in dismissing it; but on the special plea of *non est factum* the judgment must be reversed. An inspection of the original note now before us, and the variance between it, in its terms, and the description of it in the lease simultaneously executed furnished strong presumptive evidence that the words "with a lien on their crop for the within amount" were interpolated in the note after its execution; and this alteration being apparent the burden was on the holders of proving it was made either by the obligors or with their authority or consent, according to principles well settled. There is not sufficient evidence on this question to repel the presumption of the unauthorized alteration of the note. The testimony of Stalkman, the only witness examined on the subject, proves nothing more than a dispute between Snider and Manning as to the alteration in the note having been inserted by consent, after the note was given, and rather involves an admission on the part of Manning that he made the alteration and claimed to have been authorized to do so, which Snider denied. We see no reason why Manning was not a competent witness on the question, which it was so important to solve on the part of the appellees for whom he acted as agent, yet he was not examined. We regard the alteration as materially changing the terms of the note, and must, therefore, conclude that the note as altered is not the act and deed of the appellants. Wherefore, the judgment is reversed and the cause remanded with instructions to dismiss the petition but without prejudice to any cause of action the appellees may have for such founded on an express or implied agreement to pay for the use of the land.

Drain, Haswell, for appellant.

Kinchloe, Eskridge, for appellee.

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D. W. SANDERS, ETC., *v.* NICHOLAS B. DOUGLAS.

Judicial Sale—Restriction of Power to Sell Under Will.

Appellant purchased the land at judicial sale, not for himself but as trustee for S., who was restrained from selling the land by the will of her mother.

Held, that the judgment and confirmation of the sale, nor the purchase by appellant, will operate to remove or affect said restriction on the power of sale.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 12, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

Whatever may have been the object of Stewart and wife, in the personal action against them, in aiding the petitioner by their answer in suggestion the liability of the land to the plaintiffs' claim and in apparently co-operating in procuring the judgment of sale, which was rendered March 1, 1867, the right of appeal from that judgment was barred by limitation, when this appeal was taken, and the plea to that effect is sustained; and as between the parties as they now stand before this court, we can perceive no cause for reversing the case. We deem it proper to say, however, that as it is suggested by the appellant in his response to the rule against him as purchaser, that he made the purchase not for himself, but as trustee for Mrs. Addie B. Stewart, who was restrained from selling the land by the will of her mother, Mrs. T——, we do not understand the judgment of confirmation as decided—nor do we now decide that this proceeding or the purchase of the appellant will operate to remove or affect said restriction on the power of sale and conveyance, either by Stuart and wife or the appellant as trustee.

Wherefore, the judgment is *affirmed*.

Barnett, Edwards & Harding, for appellant.

Kinkead, for appellee.

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EDWARD BONDURANT, ETC., v. ANDREW JACKSON EWING.

Vendor and Purchaser—Deficiency in Amount Too Small.

The deficiency of nine acres, if clearly shown to exist, is too small to entitle the purchaser to any relief for a mere mistake or error in judgment as to the quantity of land contained in the tract.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

April 20, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

According to the written renewal of the contract, the sale was simply one in gross of all the land "supposed to contain 519 acres" for \$40,000.

It is neither alleged nor proved that the vendor was guilty of fraud in making the sale by false representations of the quantity or otherwise; but the grounds of the defense presented in the answer (which is not, as assumed to be, a counterclaim) were, that by mistake, a verbal stipulation was left out of the writing, which, if inserted, would have made it optional with the appellee to take the land as containing 519 acres for the sum of \$40,000, or have it surveyed and pay only for the number of acres he got at the rate of \$40,000 for 519 acres; and that there were but 510 acres.

The evidence conduces to the conclusion that there are but 510 acres in the tract, and that Bondurant was at one time willing to adjust the price in the manner stated, if the appellee would then elect to have the land surveyed; but it does not appear that the appellee then required or desired to have the land surveyed; and we are not satisfied from the evidence, that according to the contract he was entitled to that right, or, in other words, that there was anything omitted by mistake in reducing the terms of the agreement to writing. And according to numerous decisions of this court, the deficiency of nine acres, if clearly shown to exist, is too small to entitle the purchaser under such a contract to any relief for a mere mistake or error in judgment as to the quantity of land contained in the tract.

The judgment is therefore deemed erroneous, in so far as

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it makes any deduction for deficiency in the quantity of the land.

Wherefore, the judgment is reversed on the original appeal and the cause remanded for a judgment in conformity to this opinion; and it is *affirmed* on the cross-appeal.

Huston, Turner & Cornelison, for appellants.

Apperson & Reid, for appellee.

W. W. FOSTER, ETC., *v.* T. T. SHREVE, ETC.

New Trial After Affirmance By Court of Appeals—Attorney's Want of Knowledge as to Facts in Possession of Witness.

It is not alleged that the witness did not, when his deposition was given, recollect every fact connected with the transaction, and no reason is given why such facts were not then elicited, except that appellant's attorney did not know that he could make such proof by the witness and, therefore, failed to examine him in reference to these facts.

Held, that such diligence as would authorize a new trial is not presented.

APPEAL FROM BATH CIRCUIT COURT.

April 23, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

By the opinion delivered in this case upon a former appeal, this court adjudged that the judgment appealed from was erroneous in so far as it failed to determine that the heirs of G. W. Rogers were estopped to assert claim against Foster for any portion of the one hundred and twenty acres of land conveyed to him out of the three-hundred-acre tract devised to Mrs. Susanna Rogers by her father, Weathers Smith, and also in so far as it failed to charge Foster with the price of the slave, Alfred, and the cost of certain other slaves. The concluding paragraph of the opinion is in these words:

"In all others respects, except as herein specified, the judgment is *approved*, but for the errors pointed out the judgment is reversed on the original appeal, and on the cross-appeal so

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far as the price for which the slave, Alfred, was sold was refused and the cause is remanded for further proceedings consistent herewith."

In so far as it was adjudged that Mrs. Asberry, and the children of Mrs. Shreve were entitled to portions of the land conveyed to appellant, the judgment was not reversed but was "approved," and the further proceedings to be had were to be consistent with such approval.

The case as to the heirs of G. W. Rogers, was reopened by the reversal, but as complete relief could not be afforded appellant as against these heirs without damaging Mrs. Asberry and the heirs of Mrs. Shreve with further litigation upon this branch of the controversy, the judgment was not disturbed. In other words, as to them the judgment upon this branch of the case was affirmed, and appellant could not disturb it by subsequent proceedings, except by petition for a new trial.

His amended answer does not show that he used reasonable diligence prior to the first trial to discover the proof upon which he now relies for relief as against Mrs. Asberry and the children of Mrs. Shreve.

His principal witness, Dr. Barnes, gave two depositions before the rendition of the original judgment, the last one relating almost exclusively to the circumstances attending the conveyance by Mrs. Foster to appellant of the land in contest.

It is not alleged that Barnes did not, when this deposition was given, recollect every fact connected with the transaction, and no reason is given why such facts were not then elicited, except that appellant's attorney did not know that he could make such proof by the witness, and therefore, failed to examine him in reference to these facts. An examination of the last deposition given by Dr. Barnes shows that it was almost impossible for him to have detailed the facts held to estop the heirs of G. W. Rogers, without disclosing the participation of Mrs. Shreve and Mrs. Asberry in the transaction. Besides this, he proves that appellant was himself present, and knew as much about the transaction as the witness. It is possible that he may have forgotten that which he was so much interested in remembering, but the very many important facts his amended petition shows him to have forgotten conduces very

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strongly to show that he was grossly negligent in the preparation of his case from its beginning up to the promulgation of the opinion of this court.

We are of opinion that his amended answer does not set up such a state of facts as would authorize a new trial as to these appellees, and that the defects of the pleading are not made good by the proof, even if appellees by their answer waived the right to object to such defects.

Judgment affirmed.

Wadsworth, Turner, Apperson & Reid, for appellants.

Nesbitt & G., Huston & S. S. Goodloe, for appellees.

MARGARET A. CRESS *v.* J. B. MONTGOMERY & Co.

Mechanics' Liens—Fraudulent Conveyance After Work Begun.

At the time the improvements were commenced the legal title was in the husband, who retained it until after the greater part of the materials and the most of the work had been done.

Held, that a conveyance to the wife could not defeat the lien.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 23, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

There is a strange conflict of evidence on the subject of the contract with appellees for the improvements, to coerce the payment for which this suit was brought, and but for a few controlling facts about which there can be no controversy, a satisfactory conclusion would scarcely be possible. One is that at the time the improvements were commenced the legal title to the lots was certainly in Henry Cress, the husband, who retained it until after the greater part of the materials were furnished, and the most of the work had been done. Another one is that while the work was being done no witness has proved that Mrs. Cress gave the building any attention, or even saw what was doing.

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Montgomery conveyed the property on the Shelby street plank road to Mrs. Cress in August, 1864. She and her husband conveyed the same property to Isaac Abram in November, 1865, for \$6,000, and the lot on which these improvements were made was conveyed to Henry Cress by Mrs. M. L. Tyler in September, 1865, before the sale, or at least before the conveyance was made to Abram. And if her money was invested in the lot purchased from Mrs. Tyler the failure to have the conveyance made directly to her in the first place is a remarkable omission, and wholly unaccounted for. And then the conveyance is made to her brother by herself and husband after he, according to her theory, was from mental imbecility wholly incompetent to make a valid deed.

The materials were furnished, and the improvements made on the lot, and according to the uncontradicted evidence the amount charged therefor was reasonable, and customary. And the judgment must be *affirmed*.

Elliott, for appellant.

Jno. C. Spencer, for appellee.

BRANDIES & CRAWFORD v. T. A. LEWIS.**Carriers—Overcharge for Freight—Suit to Recover—Necessary Allegation.**

It is not alleged that at the time the freight was demanded and paid that appellants did not know that the sums demanded were more than by the terms of the contract appellees were entitled to receive, consequently the payments were neither made by mistake nor by the deceit of appellees, but with a full knowledge of all the facts.

Held, that the petition does not state a cause of action.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIV.

April 24, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

Appellants in their petition allege substantially that in December, 1867, and January, 1868, they shipped from Columbus, Indiana, through the forwarding line of appellees to Jer-

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sey City, state of New Jersey, seventeen several shipments of grain, and received appellees' bill of lading therefor, stating the dates of delivery and their weights, and the rates for which each of said shipments was to be carried, all of which are set forth in the petition.

They allege that appellees did by the bills of lading, in consideration that they would pay them freight at the rates in said bills of lading specified, promise and undertake to carry or cause to be carried said several shipments, being parcels of grain from Columbus, Indiana, to Jersey City, state of New Jersey, and there to deliver the same, or cause them to be delivered to the order of Carlos Cobb, their consignee, for their use on the payment of the freight thereon at the rates theretofore agreed upon, as set forth in said bills of lading, which are referred to and made exhibits in the case.

They allege that appellees failed, and refused to keep and perform their promise in this, that they did not deliver said seventeen shipments of grain shipped through their line as evidenced by said several bills of lading, nor any of them upon the payment or tender of the freight at the rates for each of said shipments respectively agreed upon as set forth; but suffered their agents, bailees, and servants of Jersey City to demand from said Carlos Cobb, consignee, and agent of plaintiff, greater sums of money for freight than they, according to the said rates agreed upon, were bound to pay, and to withhold the grain from said consignee and agent until said freight bills were paid, the excess over the price agreed upon being \$328.71.

And they charge that appellees broke their promise, and by extortion from said consignee and agent of plaintiff received and collected \$328.71 to which they had no right and which they unjustly detain, etc.

The *gravamen* of the action is that appellees claimed and collected more money as freight for transporting the grain, than by the terms of the contract between the parties they had a right to collect or were entitled to, and the bills of lading are referred to as showing the contract price.

It is not alleged that at the time the freight was demanded and paid that appellants did not know that the sums demanded were more than by the terms of their contract appellees were

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entitled to receive, consequently the payments were neither made by mistake nor by the deceit of appellees, but with a full knowledge of all the facts.

The question then is was the money paid voluntarily, or was it paid by compulsion? There is not a direct allegation in the petition that appellants tendered the prices agreed on for the transportation of their grain, and demanded the delivery thereof, nor that appellees refused to deliver the same unless or until the freight charged was paid; nor is it alleged that any objection was made at the time to the payment, or that payment was made under protest. It is not even alleged directly that appellees or their agents did, in fact, demand the excess of freight and refuse to deliver the grain until said excess was paid and that they were compelled to pay the same in order to get possession of their grain.

But by looking into the testimony of Cobb, and Kneeland, witnesses for appellant, it will be seen that the difference is not in the price collected and that agreed upon per hundred for transportation, but arises from the difference in the quantity, or weight of grain transported, and that charged for, the difference being 216 43-56 bushels as these witnesses prove. Cobb says that "the actual freight charged by the Erie Railroad Company and so paid by me was 1,418,503 equal to 25,330 23-56 bushels, the delivery to me was 25,113 36-56 bushels, showing that I paid freight on 216 43-56 bushels more than the road delivered to me."

The price actually paid for the transportation of appellant's grain is not proved, nor does it satisfactorily appear that the payments were not voluntarily made. The appellants therefore failed to make out their case, and the judgment must be *affirmed*.

Dembitz & Wehle, for appellants.

Gibson & Son, for appellee.

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GEO. W. BRUNER, ETC., v. LUCINDA BERRY, ETC.

Compromise and Settlement—Conflicting Claims—Consideration—Mistake of Law.

Where parties have conflicting claims to land and a law suit likely to arise to test the superiority of the one or the other, to avoid that conflict the parties may enter into an agreement to compromise, and should one of the parties by mistake of law arising on the facts be induced to enter into the compromise.

Heid, that such mistake would not be a cause to set aside the compromise nor will the court undertake, in such a case, to investigate the merits of the claim or to determine whether it was of sufficient importance to form a consideration for a compromise.

APPEAL FROM HANCOCK CIRCUIT COURT.

April 25, 1872.

OPINION OF THE COURT BY JUDGE PETERS :

The contract of compromise entered into between Peter Bruner and appellants, on the 23d of June, 1865, recites that John H. Richardson, attorney in fact for James Taylor and others, *had sold to Edmund L. Bruner* certain interest in a tract of land lying partly in Daviess and partly in Hancock counties, interfering with the tract purchased by said Peter Bruner, of Calhoun, and Triplett, and a controversy had and then existed between said Peter Bruner, and the widow, and heirs of said Edmund L. Bruner, concerning said lands. Now, therefore, for the purpose of settling and compromising said controversy, it is herein agreed, etc.

In the writing Peter Bruner admits that his son Edmund had purchased the interest of James Taylor and others in the lands described, and he furthermore admitted that there was a controversy between himself and the widow and heirs of his deceased son in relation to the interest purchased by decedent. But it is insisted that the claim asserted by the widow and heirs was a mere pretense, that there was in fact no substance in it and could not, therefore, form the basis of a compromise.

There is no complaint that Peter Bruner did not fully understand all the facts connected with the purchase by his son of the claim of Taylor, etc., to the land; indeed the evidence tends to show that the purchase was made by his direction, and it is contended that he paid the consideration.

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But, understanding all the facts, if he was, by his mistake of the law arising on those facts, induced to enter into the compromise, such mistake would not be a cause to set aside the compromise. Nor will the court undertake in such a case to investigate the merits of the claim of one of the parties to determine whether it was of sufficient importance to form a consideration for a compromise, or whether the act of the party was wise or unwise.

The parties had conflicting claims to the land; a law suit was likely to arise to test the superiority of the one or the other, and to avoid that conflict the parties thought it expedient to enter into the agreement to compromise, and we think the consideration sufficient to uphold the agreement.

Nor does it seem to the court that the dire evils, which counsel apprehend, are likely to arise from the enforcement of such contracts as the one under consideration. On the contrary, in many cases, they might promote the peace and harmony of families, and to a limited extent at least society. And this court, in *Smith v. Smith, etc.*, 5 Bush 625, gave its sanction to the enforcement of a similar contract.

Judgment *affirmed*.

Williams & Baker, for appellants.

Kincheloe & Pate, for appellees.

ANTHONY DEWIT v. O. REDWILTZ, ETC.**Contract—Collateral Parol Agreement.**

A collateral parol agreement for indulgence not entirely consistent with the writing is not enforceable against the written evidence of the contract.

APPEAL FROM MERCER CIRCUIT COURT.

April 25, 1872.

OPINION OF THE COURT BY JUDGE HARDIN :

It sufficiently appears from the testimony of Gaither and Allen that the erasure of the words in the mortgage, deferring the time

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of payment, was authorized and materially agreed to by both Dewit and Redwiltz; and there is no satisfactory evidence that Redwiltz induced Dewit to agree to this by any fraudulent means. There is some evidence of a collateral parol agreement for indulgence, not entirely consistent with the writing, which is not enforceable as against the written evidence of the contract. No sufficient grounds being shown for reforming the writing. The judgment of sale was, therefore, right. And in the subsequent proceedings we perceive no error or irregularity to the prejudice of the appellant for which the final judgment ought to be reversed, even if he is not estopped by his own position on the record from complaining of the relief adjudged to Wilson upon his own theory that Wilson bought and paid for the property for him and as his friend and trustee.

Wherefore the judgment was affirmed.

Thompson & Daviess, for appellant.

Kyle, J. B. & P. B. Thompson, for appellee.

SMITH & WAIDE v. CULBERTSON & Co., ETC.

Assignment for Benefit of Creditors—Lien—Non-acceptance by Trustee—Chancellor Will Appoint.

Before a lien has been acquired by a creditor a debtor may rightfully convey his property to all of his creditors, or to a trustee for their benefit and the non-acceptance of the trust, by the trustee, will not defeat the rights of the beneficiaries under the deed of assignment as the chancellor will appoint a trustee.

APPEAL FROM HANCOCK CIRCUIT COURT.

April 24, 1872.

OPINION BY JUDGE PETERS:

Appellants acquired no lien on the effects of their debtors by the institution of a suit against them merely, and before a lien had been acquired by the creditors the debtors might rightfully convey their property either directly to all the creditors or to a trustee, or assignee, in trust for them all; such disposition was

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not only legal, but was just and equitable, the creditors being equally meritorious. Nor did the right of the beneficiaries under the deed, depend upon the acceptance or non-acceptance, of the trustee; the chancellor would take charge of the estate conveyed and appoint a trustee if necessary.

As the judgment distributed the funds *pro rata* among all the creditors, appellants included, they have no just cause to complain.

Wherefore the judgment was *affirmed*.

Kinchloe, Rodman, for appellant.

R. Y. Bush, for appellee.

B. MITCHELL'S HEIRS v. JOHN THOMPKINS' ADMR. AND OTHERS.

Will—Attempt to Dispose of Property Belonging to Another.

That the testator intended to dispose of the land which descended to his wife from her father cannot admit of a doubt. He gave to his wife all his estate during her life, and at her death the property which he received with her was to be equally divided between his two sons.

Will—Election—Acquiescence Evidence of—Waiver.

The wife lived more than 25 years after the death of the testator and never renounced the provisions of the will nor ever claimed any right to dower or distribution as a widow unprovided for, but acquiesced in and held under the will as a devisee, which amounted to an election to stand by and take under the will.

Will—Election Cannot Be Revoked After Death.

The widow having taken under the will with a knowledge of her rights, she, if living, could not revoke her election and her devisee cannot do so after her death.

APPEAL FROM MERCER CIRCUIT COURT.

April 20, 1872.

OPINION BY JUDGE PETERS:

After having threaded with all the patience that is the heritage of humanity, the various labyrinths constructed by the pleaders

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of the different parties to this controversy, in seasons of uninterrupted leisure it would seem, we have discovered but two questions involved.

1st. Did Mrs. Mitchell take the estate, devised to her by her husband, and hold the same under his will, including the land which descended to her from her father?

And, 2d, what estate passed by the deed of Harvey M. Mitchell to B. B. Mitchell of the 9th of April, 1841?

These two questions will be considered in the numerical and natural order in which they are here presented.

The testator, Isaac Mitchell, in the first clause of his will, uses this language. "I give to my two youngest children, Basil and Harvey, after the death of their mother, the property or its value which I received with her to be equally divided between my two said children, Basil and Harvey. I give to my wife during her life all my estate; at her death, the two youngest children are to receive the before mentioned legacy, the balance to be equally divided between my four children, William, Marthena, Basil and Harvey."

That the testator intended to dispose of the land which descended to his wife from her father cannot, from the language used, admit of a doubt; he gave to his wife all his estate during her life, and, at her death, the property which he received with her was to be equally divided between his sons, Basil and Harvey, who were also her sons. This language is comprehensive enough to embrace the land in controversy, and we think the testator intended to dispose of it by his will.

It is next to be considered whether Mrs. Mitchell elected to hold under the will and did not claim the land against it in her own right—for although the testator could not pass any other, or greater interest in the land than he himself held, yet if she elected to abide by the will, and claim its provisions, she thereby waived her independent right to the property embraced by it; and that property passed by the will in consequence of an estoppel arising from her voluntary act of election, and should, for all purposes, be considered as the estate of the testator, which he had a perfect right to dispose of by his last will and testament.

From all the facts and circumstances developed, it is difficult

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to resist the conclusion that Mrs. Mitchell voluntarily and understandingly elected to approve and abide by the will of her husband, and to waive any rights she might have in conflict with it.

She lived more than 25 years after the death of the testator, and never renounced the provisions of the will—never claimed any right to dower, or distribution as a widow unprovided for, but seemed to acquiesce in, and hold under, and doubtless considered herself as devisee.

And the court is not authorized to presume that she did not fully understand her rights and the consequences of her acquiescence—on the contrary it is to be presumed that she understood that her whole estate, as well as that of her husband, was embraced by the will, and that she could not hold her own estate in her own right, and her husband's also as his devisee. And having taken under the will with a knowledge of her rights, she, if living, could not revoke her election, and certainly her devisee cannot do so after her death.

This doctrine is ably discussed and fully recognized in the case of *Clay & Craig v. Hart*, 7 Dana 1, and by other authorities fully established.

The two sons of the testator, Basil and Harvey, took a vested remainder in the land in controversy under his will, and the undivided interest of Harvey therein passed by his deed of April 9, 1841, to his brother, Basil B. Mitchell; for there is not sufficient evidence to raise even a suspicion that the sale to him was what it purports to be, absolute, made for a valuable consideration and in good faith.

Wherefore the judgment is *reversed*, and the cause is remanded with direction to dismiss the original, and the several amended petitions of Thompkins' Admr. and of Bohon against Basil Mitchell's heirs, and also the cross-petition of Harvey M. Mitchell against the same, and for further proceedings consistent herewith.

A. Hardin, T. C. Bell, for appellant.

Polk & Durham, for appellee.

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A. JOHNS *v.* A. A. CASSADY.**Evidence—Rejection of Proposed Evidence—Statement.**

Where a party offers to prove a fact, which the court holds to be incompetent, he should make a statement as to what the evidence would be on that point and incorporate it in the bill of exceptions.

APPEAL FROM HART CIRCUIT COURT.

April 19, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

If Cassady purchased the cattle for Huber, it would have been competent for appellant to prove the statements of Huber in relation to the contract. But appellant failed to disclose what Compton would prove in relation to the statements made by Huber, and this court cannot tell unless appellant had announced to the court what the conversation was which he would prove by the witness, and the same had been incorporated in the bill of exceptions, that it would have been material for appellant, and as it does not appear that appellant was prejudiced by the ruling of the court, it cannot be a cause of reversal.

It is alleged in the petition that appellee purchased the cattle at \$3 per hundred to be paid on delivery, and that appellant failed to deliver the cattle at the time and place of delivery, and that the cattle were worth \$3.50 per hundred; which, by any fair or reasonable interpretation, means that they were at the time and place of delivery worth \$3.50 per hundred.

It was not made the duty of appellee either by the terms of the contract, or by the law, for him to make the necessary preparation to weigh the cattle.

There is nothing in the objection that Cassady did not sign the contract. Johns was the vendor, and by his writing was bound to deliver or to tender the cattle, and if Cassady had failed to attend to receive them, and he had thereby suffered loss, the law afforded him ample remedy.

As to the price of the cattle, Rowtill proves they had advanced in the neighborhood from $\frac{1}{2}$ to $\frac{3}{4}$ per cent. per pound, and he told appellant that they had so advanced, and he admitted it.

It is deemed unnecessary to enter upon a discussion of the

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competency of the evidence relating to the agreement on the part of appellant to accept the appellee's check on the bank in payment for the cattle, as the evidence was not objected to, but was permitted to go to the jury without exception.

And perceiving no error in refusing instructions as asked by appellant, and in modifying those given, the judgment must be affirmed.

Brown & Murray, for appellant.

H. C. Marlin, Wm. Beard, for appellee.

ELIZABETHTOWN & PADUCAH RY. CO. v. GEO. STICKLER.

Eminent Domain—Measure of Recovery for Land Taken.

The judgment is for more than the entire value of the land taken and the fifteen acres cut off by the road, and exceeds the entire value according to the assessment made by appellee.

Held, that testing the measure of recovery by appellant's heirs v. Helm's heirs the damages allowed are unreasonable and excessive.

HARDIN COUNTY CIRCUIT COURT.

April 19, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

It seems to this court that the judgment in this case ought not to be allowed to stand. Stickler assessed his tract of land at about twenty dollars per acre. Allowing it to be worth double that amount, the three acres taken by the railway company would be worth \$120. The fifteen acres separated from the main tract by the road would be worth \$600. The judgment is for \$464, more than 3-5 of the entire value of the three acres taken, and the fifteen acres cut off by the road, and greatly exceeding the entire value thereof, according to the assessment made by appellee when acting under oath.

Testing the measure of recovery by the rule laid down in the case of the *Appellant's Heirs v. Helm's Heirs*, this day decided, it is manifest that the damages allowed appellee are unreasonable and excessive.

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Wherefore the judgment must be reversed. The cause is remanded for a new trial, upon the principles laid down in the opinion of this court in the above named case.

Pindell, for appellants.

Montgomery, for appellee.

LEE C. SMITH *v.* NOAH SMITH'S HEIRS.

Mortgage—Wrongful Control—Responsibility for Negligence Causing Loss.

Appellant obtained control of the mortgage by the assertion of an unfounded claim against the estate of his father and is, therefore, responsible for the loss of the debt by reason of not instituting a suit to collect it, in the lifetime of the mortgagor.

APPEAL FROM BOURBON CIRCUIT COURT.

April 4, 1872.

OPINION BY JUDGE LINDSAY:

Appellant was never entitled to the possession or control to the mortgage executed by Abraham Wirth to Peter Smith and others. He obtained control of such mortgage by reason of the assertion of an unfounded claim against the estate of his deceased father, and consequently held it all the while in his own wrong. Whether he was or not bound as assignee to use legal diligence in the collection of the debt evidenced by the mortgage, we do not deem it necessary to determine. Holding it as he did without right, he cannot be heard to say that the appellants lost nothing by reason of his negligence. He delayed suit from the 14th of October, 1864, until September, 1868. The life estate of the mortgagor in the lands embraced in the mortgage did not terminate until August, 1868, nearly four years after the assignment to him. It cannot now be determined what amount might have been realized had this life estate been subjected to sale by a prompt and energetic institution of a suit for the foreclosure of this mortgage. Appellant, who occupied no better position than that of a mere intermeddler, was re-

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sponsible for the delay, and he has no right now to complain that the loss falls upon him. Seeking as he does to escape responsibility, the onus is upon him to show that appellees did nothing by reason of his interference with the administrator. It is his misfortune that each fact can not now be shown. It is no ground of reversal that the judgment should have been in favor of the administrator instead of the appellees.

The administrator is a party to this action and is not complaining on that account. This judgment is a bar to any subsequent proceeding for the recovery of the same debt by him.

Therefore such judgment is affirmed.

Davis, for appellant.

Alexander & Turney, Hanson, for appellee.

GEO HAMILTON, ETC., v. A. M. BARNES, ETC.

Continuance—Diligence—Sound Discretion of the Court.

The court does not abuse a sound discretion in overruling a motion for continuance, where the same order had been repeatedly moved by the same party who had shown no diligence in procuring a copy of their discharge in bankruptcy, especially where there was a rule to try.

Evidence—Records and Proceedings of United States Courts—How Procured.

The court properly refused to allow the certificate of the discharge in bankruptcy of Hunt & Berry to be read for any purpose. Section 18, chapter 35, Revised Statutes, requires that records and proceedings of the courts of the United States shall be attested by the clerk with the seal of the court annexed, and certified by the judge of the court to be attested in due form before they shall be entitled to faith and credit in this state. This regulation must be regarded as the rule of evidence in this state.

Limitation—Statute Becomes Bar—Subsequent Legislation Does Not Affect.

The statutory bar had become complete before the act was passed, and it is not to be assumed that the Legislature intended to revive rights barred at the time of the enactment.

Depositions—Bias Subsequently Removed Does Not Make Competent.

A witness being incompetent when his deposition is taken, a subsequent verdict in his favor cannot be made to relate back to that time, so as to remove the bias under which he then labored.

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Appeals and Errors—Reversal As to One Party No Cause As to Others.

An appellant has no right to demand a reversal of a judgment against him because of the fact that it must be reversed as to another appellant.

New Trial—Liabilities Several and Joint.

Where the liabilities of the parties are several as well as joint, a new trial may be granted as to one and the verdict allowed to stand as to the others. Where a defense is merely personal it cannot be made to operate in favor of another party.

Trial—Verdict—Informality.

When a verdict leaves no fact to be ascertained by the court, but a mere calculation to be made, it is not void.

Payment—Application As Between Particular Debts.

When a debtor fails to direct how a payment shall be applied and his creditor applies it to the wrong debt, he cannot be heard to say that this mistake exonerates him from paying the debt sued on.

APPEAL FROM BOURBON CIRCUIT COURT.

April 4, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

This was an action upon a bill of exchange for five thousand eleven hundred dollars, drawn by James C. Hamilton, on Hunt and Berry, in favor of George Hamilton, and endorsed to Hoffman, Barnes & Co.

The suit was instituted in the Montgomery Circuit Court on the 26th of January, 1859, the Hamiltons only being made defendants.

In February, 1859, they answered claiming that they were accommodation parties to the bill, which fact was known to the holders, and that they had been released by the failure of plaintiffs to use legal diligence in the collection of the debt from Hunt and Berry, the real debtors, they also relied upon the right of protest, notice, etc.

On the 1st of March, 1859, George Hamilton filed an amended answer giving a detailed statement of the transactions between the firms of Hunt & Berry and Hoffman, Barnes & Co., and asked that the latter be required to answer certain interrogations as to the state of the accounts between said parties.

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At the same time, plaintiffs, by an amended petition, set up the fact that H. H. Turner, a member of the firm of Hoffman, Barnes & Co., had sold out his entire interest to the remaining partners, and asked that his name be stricken from the docket as a party plaintiff, he being no longer involved in the matter in controversy. Proper security as to costs having been given this order was entered, and Turner made a party defendant.

In February, 1861, by another amendment, the fact of the withdrawal of Hoffman from the firm in question was set up and a similar order made with reference to him.

In 1863, the case was by change of venue removed to the Clark circuit court, where a trial was had in November, 1865. A verdict was found for the defendants, but upon motion this verdict was set aside and a new trial awarded.

At the same term the plaintiffs filed still another amended petition, making Hunt & Berry, the acceptors of the bill, parties defendant, and asked for judgment against them. These parties amended at once, pleading and relying upon the statute of limitation as a bar to the action as against them.

In May, 1869, the venue was changed to the Bourbon circuit court.

In October, 1870, the Hamiltons withdrew all their answers and in lieu of them filed a special plea of judgment, which was to be considered as traversed upon the record, the plaintiffs having the right to give in evidence all matters of avoidance to such plea, as though specially relied on in their pleadings.

Hunt & Berry also filed an amended answer pleading their discharge in bankruptcy.

In October, 1870, another trial was had, which resulted in a verdict and judgment for the plaintiffs, and from that judgment this appeal is prosecuted.

We will endeavor to notice such of the numerous errors assigned by the appellants.

It does not appear that the court abused a sound discretion in overruling the motion of the defendants for a continuance of the cause; the same order had been repeatedly moved at their instance; they had manifested no diligence in procuring a copy of the discharge in bankruptcy granted to Hunt & Berry by the United States district court for the State of Il-

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linois; they were notified by the order made at the previous term of the court that they would be compelled to try the case when again reached for trial, and they ought not to have waited until the next term was about to commence before procuring the copy of such discharge. That they were not misled by an agreement with appellees or their counsel is evidenced by the fact that they did at that late hour attempt to procure the necessary proof of the existence of a fact, which they now claim was to be admitted upon the trial.

The court properly refused to allow the certificate of the discharge in bankruptcy of Hunt & Berry to be read for any purpose. *Sec. 18, Chapter 35, Revised Statutes*, requires that records and principal proceedings of the courts of the United States shall be attested by the clerk with the seal of the court annexed, and certified by the judge of the court to be attested in due form, before they shall be entitled to faith and credit in this State. This regulation does not conflict with any act of congress upon the subject, and it must be regarded as the rule of evidence in the courts of this State. The decisions in the cases of *Mason v. Lawrence*, 1st *Cv. C. C.* 190, and *United States v. Wood*, 2d *Wheaton*, *Civ. Cases* 326, settle the rule as to the different circuit or district courts of the United States, but have no application to the practice in the State courts.

Hoffman & Turner were competent witnesses, for the appellee's proper orders had been made as to them for the security of past and prospective costs. The case of *Dougherty v. Smith & Urline* was deliberately and, as we think, properly overruled by this court by the opinion delivered in December, 1864, in a case between these same parties.

The plea as to usurious interest claimed to have been paid was so indefinite that it might properly have been disregarded. It is, therefore, no ground of complaint that the jury failed to allow a sufficient sum or a credit on account of such usury.

The action of the court in sustaining the exceptions to the deposition of Hunt presents a question of some difficulty. These exceptions were based upon the incompetency of the witness. The court was asked by the parties to pass upon all exceptions to depositions before the trial began. At that time it was impossible to tell whether or not Hunt's plea of the statute of

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limitations would prove availing. It seems to us that the court could do nothing less under the circumstances than to sustain the exceptions.

The same reason which induced the court to sustain the exceptions before the commencement of the trial existed at the time the appellants subsequently offered to read the deposition, and the court did not err in refusing at that time to allow it to be read.

The court erred, however, in its instructions to the jury, when the special issue between the appellees and Hurt as to his plea of limitation was submitted.

If it be admitted that the act of March 5, 1865, applying to the county of Bath the statute of February 24, 1864, could in any state of case be made to apply to a suit prosecuted in Montgomery county, because one of the defendants lived in Bath, it certainly does not affect the rights of the parties to this controversy. The statutory bar had become complete before the act was passed, and it is not to be assumed that the legislature intended to revive rights barred at the time of this enactment. *Cassity v. Storms*, 1st Bush 452.

But if the jury had been properly instructed and the finding had been favorable to Hurt his deposition could not have been read as evidence in favor of the other defendants. Being an incompetent witness when he gave the deposition, a subsequent verdict in his behalf could not be made to relate back to that time, and remove the bias under which the law presumes he then labored. *Hoddix' Heirs v. Hoddix' Admr.*, 5th Littell 202.

It appears from the affidavit of John B. Huston, one of the attorneys for appellants, that Hunt was absent from the county of Bourbon at the time of the trial of the action, and hence a verdict in his favor would not have enabled the other defendants to use him as a witness even if he had been rendered competent by a favorable verdict. It results, therefore, that none of the appellants except Hunt have a right to complain on account of the error indicated.

Nor have they the right to demand a reversal of the judgment as to them, because of the fact that it must be reversed as to Hunt. As drawers, acceptors and endorsers of the bill of exchange, their liabilities are several as well as joint. A new trial

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might have been granted to Hunt in the court below, and the verdict allowed to stand as to the other defendants. *Shelton, etc., v. Hoslow*, 15 B. Monroe 549. *Dougherty v. Dorsey*, 4th Bibb 210. His defense is merely personal; it does not go to the merits of the controversy, and can not be made to operate in favor of any one except himself. The case of *Coon v. Conway*, 3d Dana 154, seems to conflict with the conclusion, but it is supported by the later cases, which, in our opinion, establish the correct rule. The verdict of the jury conforms substantially to the provisions of the Civil Code of Practice, in the exercise of their right to do so they found specially as to certain facts.

1st, that the plaintiffs were entitled to recover the amount of the bill sued on with interest from its maturity. As to this amount there was no controversy, hence there was no issue to be determined.

2d, that defendants were entitled to a verdict of \$128.33, with interest, on account of usurious interest contained in the bill. Also the further credit of \$457.33, as set forth in the instructions. It is complained that the dates of these two credits are not fixed. This objection is more specious than solid. As to the usury, as a matter of necessity, being incorporated into the bill, it should bear interest from its maturity. The date of the credit for \$457.33 is shown by an endorsement on the back of the bill itself.

The verdict left no fact to be ascertained by the court, nothing except a mere calculation remained to be done. The verdict fixed the amount of the recovery, and although informal, it was not void. It can not be said that the jury did not assess the amount of the recovery. Such amount is rendered sufficiently certain by the record. *Brannin & Smith v. Foree's Admrs.*, 12 B. Monroe 506.

Instruction No. 4, asked for by appellants, was properly refused. It was misleading in this: It wholly ignored all the evidence tending to show that the application of the proceeds of the two \$3,000-bills to other debts than the bill sued on had been notified by at least some of the defendants.

The modification to instruction No. 7 was properly made and was in no way prejudicial to appellants.

We perceive no available objection to appellee's first instruc-

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tion. If appellants failed to direct how the proceeds of the two \$3,000-bills should be applied, and their creditors applied such proceeds to the payment of the wrong debts according to strict principles of law, still as they have thereby received the full benefit of the payment they ought not now to be heard to say that this mistake exonerates them from the payment of the debt sued on. The object of this instruction is only to protect appellees against such a consequence.

No. 2 is also correct. The special plea of payment did not involve a settlement of accounts between the firms of Hoffman, Barnes & Co. and Hunt & Berry. No issue of that kind was raised by the pleadings.

Without discussing each instruction separately, we are clearly of opinion that (except as to Hunt) the law of this case was substantially given to the jury, and as their finding was clearly right, we will not disturb the judgment of the court below on account of errors purely technical and by which the appellants were not prejudiced.

The face of the bill shows that the parties to it contemplated its protest in case of dishonor, and although such protest was unnecessary, they can not now escape the payment of the notary's fees.

The judgment appealed from is reversed as to Appellant Hunt, and the cause remanded with instructions to dismiss the petition as to him. He will recover his costs in this court, including an attorney's fee.

As to all the other appellants, the judgment is affirmed. Appellees will recover against them their costs in this court, including attorney's fees.

Huston, for appellants.

Waters, Turner, for appellees.

D. W. DUNNING, ETC., v. COMMONWEALTH.

Criminal Law—Several Charges—Preliminary Hearing—Bail—Bond Including More Than One Charge—Forfeiture.

Thomas P. Dunning was taken before an examining court, charged with four distinct offenses, and after investigation was committed on all of them. Subsequently he was admitted to bail by the county judge, who took only one bond for all of the commitments.

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Held, that the criminal code contemplates that where a party is charged with more than one public offense, and the examining court, who investigates the charges, be of the opinion that he shall be held to bail to answer said charges, and bail is offered, a separate bond in each case shall be taken.

Robbery—Attempt to Rob—Assault With Deadly Weapon—Ordinary Pocket Knife.

A mere attempt to rob unaccompanied with an assault with a deadly weapon, or a demand of something of value from the person of another with force and violence, with the felonious intent to commit robbery, is not an offense at common law, nor by statute. Neither is it a public offense to carry an ordinary pocket knife concealed, which may be a deadly weapon.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

April 26, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

It appears from the testimony of Handleni, judge of the Livingston county court, that Thomas P. Dunning was taken before an examining court for said county, charged with four distinct offenses, and after an investigation of said charges, he was committed on all of them by said court, but neither the warrant nor any of the proceedings of that court are presented in this record. Subsequently he was admitted to bail by said county judge, who took only one bond for his appearance at the next circuit court for Livingston county with appellants as his sureties to answer to each of said alleged offenses, which are described in said bail bond as follows: "First, for robbing of John Heater. Second, charge of an attempted robbing on a negro man named Lewis Dabney, and a third charge of malicious shooting of H. N. Perkins, and a fourth charge of carrying concealed weapons. And being admitted to bail in the first and second charges in the sum of five hundred dollars each, and in the third case in the sum of three hundred dollars, and in the fourth case in the sum of one hundred dollars, the four commitments amounting to fourteen hundred dollars."

The principal having failed to appear in discharge of his recognizance, the same was adjudged forfeited and a summons issued against him and his sureties to show cause why judg-

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ment should not be rendered against them for the penalty of the bond, which was executed on the sureties and returned not found as to him. The sureties filed an answer, and on a trial of the case judgment was rendered against them for thirteen hundred dollars, and they have appealed.

The criminal code provides that a person charged with the commission of a public offense shall be liable to be immediately arrested and proceeded against. *Sec. 5, Cr. Code.*

When arrested he is to be taken before a magistrate of the county in which the public offense has been committed and if the offense charged be a felony, an examining court is then to be formed to examine into the charge, and if when the examination is closed the court is of the opinion that there are reasonable grounds to believe that the defendant is guilty of the offense charged, he shall be held for trial and committed to jail, or discharged on bail, if the offense be bailable, etc. *Sec. 59.*

A mere "*attempt to rob*" unaccompanied with an assault with a deadly weapon, or a demand of something of value from the person of another with force and violence with the felonious intent to commit robbery, is not an offense at common law, nor by statute. Neither is it a public offense to carry an ordinary pocket knife concealed, which may be a deadly weapon.

The record therefore fails to show that the examining court had any authority to commit Thomas P. Dunning on these two charges, or to require bail of him, nor that the county judge was authorized to take the bond.

The criminal code evidently contemplates that where a party is charged with more than one public offense, and the examining court who investigates the charges shall be of the opinion that he shall be held to bail to answer said charges, and bail is offered, a separate bond in each case shall be taken. We do not, however, decide that a sufficient bond might not be taken for his appearance in both cases; that is not the question now before us. The bond in this case is not in all respects such as is authorized by law, and the defects pointed out are fatal. Wherefore the judgment is reversed and the cause is remanded with directions for further proceedings not inconsistent with this opinion.

Bush, for appellants.

Rodman, Lockett, for appellee.

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J. B. ALEXANDER & Co. v. JOHN S. CAIN, ETC.

Brokers—Contract—Acceptance and Rejection of Orders to Purchase Stocks.

Under the contract the appellants did not have the right to accept and reject orders from appellee at pleasure. His margin was sufficient to authorize the purchase of stocks on his order and the refusal of appellants to buy stocks for the appellee resulted in a loss to him of \$7,000. This loss was the direct and immediate consequence of a plain and palpable violation by appellants of their contract with appellee, and they are, therefore, responsible for the loss.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 30, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The existence of the contract between appellants and Barrett is sufficiently established by the correspondence between those parties.

That Barrett permitted Cain to operate in his name and under his contract, with the knowledge of Alexander & Co., is also clearly shown.

The evidence also shows that Cain had authority to use Barrett's name in making the order for the purchase of the Erie stock on the 14th of November, 1868. It is true that Barrett had returned from the country, but this fact does not seem to have been known by Cain, when the first telegram was sent, and Barrett ratified what had been done by turning over to him the answer to the dispatch, and permitting him to continue the telegraphic correspondence in his name. In the letter written by Barrett on the evening of the 14th of November, he regrets the quarrel between Cain and appellants, but does not repudiate the acts of Cain, nor intimate that the use of his name was unauthorized or unwarranted.

Under their contract with Barrett, appellants did not have the right to accept or reject orders at pleasure. No such right was reserved in their letter of the 12th of September, 1867, and their uniform practice after that time had been to purchase such stocks as were ordered. And only two months before the order of the 14th of November, 1868, they had bought Erie stocks upon Barrett's order.

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The evidence also conduces to show that Cain's margin was sufficient to authorize the purchase of the Erie ordered. That he had over \$4,700 to his credit is manifested by the fact that five days thereafter Barrett's check for \$5,000 drawn on Cain's account was paid. Besides this, the reason assigned for refusing to make the purchase was not that the margin was insufficient, but that the stocks ordered were not worthy of confidence as collaterals.

The refusal of appellants to buy the 500 shares of Erie on the 14th, and sell the same on the 16th of November, resulted in a loss to Cain of near \$7,000. This loss was the direct and immediate consequence of a plain and palpable violation by appellants of their contract with Barrett, under which they had consented that Cain might operate, by theretofore buying and selling stocks which they knew were being bought and sold upon his account. That it was possible for Cain, after the reception of appellants' first telegram on the 14th of November, to have withdrawn his margin from that house, and made a new contract with some other firm, and thus secured the benefit of the speculation he now complains of losing, may be admitted, and yet such a possibility will not exonerate appellants from responsibility. They had no right to demand the exercise by one of their customers of such extraordinary diligence, in order to enable them to escape the consequences of a violation of their contract with him. That Cain was a customer of theirs, and that they had reason to believe that the order made on the 14th of November was for his benefit, appears from their reply to his answer and cross-petition. He charges directly and explicitly that he made such order through his agent, and appellants reply that "whether or not defendant (Cain) had any interest in the purchase and sales ordered by the said Barrett, plaintiffs do not know and are unable to state." They do not say that they did not have information upon the subject, nor that they did not *believe* that Cain was interested. The proof in the case shows that Barrett was not a necessary party to this suit, although Cain claims, under the provisions of his contract, Barrett's letters and deposition show clearly that he sets up no claim to the damages in controversy, and that Cain operated for himself, with his express consent, and with the implied consent of appellants.

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Appellants can not complain that Stickney was made a party. If they are responsible to Cain for the amount adjudged against them, it can not prejudice them to have the judgment with Cain's consent rendered in favor of Stickney. Besides this, appellants are non-residents, and Stickney might have assigned the claim back to Cain in order to enable him to use it as a set-off against the amount due them on the purchase of the house and lot. Stickney and Cain both being parties to the litigation, the judgment in this case is a complete bar to any other suit by either of them on account of the violation of contract complained of. It appearing that Stickney was the assignee of the bond for title to the house and lot, as well as the claim for damages, the chancellor did not abuse a sound discretion in requiring him to be made a party, and further than this appellants did not except to the order requiring him to be made a party. If it be conceded that Cain attempted to conceal the existence of the claim here asserted in a proceeding had against him by a creditor, that fact can not avail as a defense to this suit. Nor does the proof of Cain's statements when examined by Colonel Wood show that he did not regard appellants as responsible to him for failing or refusing to obey his order for the purchase of the Erie stock.

The manner in which Cain obtained the possession of the house and lot, and his object in making the purchase, are matters of but little consequence in the settlement of the litigation.

Appellants do not seek to rescind the contract of sale, nor to recover possession of his house and lot, but to enforce a specific execution of the contract, and to compel Cain to retain possession of the property.

The chancellor properly refused to allow Mertz to be made a party. His claim does not grow out of, and is in no way affected by the cause of action set out by appellants; nor is there anything to show that Cain was authorized to use it as a set-off to appellants' claim against him.

The judgment is affirmed upon both the original and cross-appeal.

Bullock, Anderson & Weissinger, for appellants.

Thompson, Booth & Kline, for appellees.

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W. C. MORRIS *v.* J. W. KIMBLE, ETC.**Attachment.**

A third party cannot hold personal property against an attaching creditor, where the purchase price has not been paid, nor the possession delivered.

APPEAL FROM McCracken Circuit Court.

April 26, 1872.

OPINION BY JUDGE PRYOR:

The testimony in this case conduces to show that the New Orleans & Ohio Railroad Company owned near fifty-four tons of old iron that was sent to New Albany for the purpose of having it rerolled. The contract for the iron was made by Flournoy as the president of the company, with J. Bragdon & Co., without even the knowledge of the appellants, who are now asserting claim to the whole of it. The appellants were entirely ignorant that any of the old rails belonging to the New Orleans & Ohio Railroad Company had ever been converted into new ones, or had been exchanged by Flournoy for other rails. He had no such authority from appellants to make any such agreement with Bragdon & Co., and in fact no right or title had ever been acquired by the appellants to any of the old rails belonging to this railroad company, nor had Flournoy been authorized to dispose of them.

Flournoy made a contract with the appellants by which the rails that the latter had bought of the Mobile & Ohio Railroad Company were to be rerolled and the new rails used by way of loan on the track of the New Orleans & Ohio railroad.

It seems that the New Orleans Railroad Company was indebted to the Mobile & Ohio railroad, in the sum of ten or twelve hundred dollars, and that Flournoy agreed with Morris, etc., that if they would pay this debt, they might have all the old rails belonging to the New Orleans road. That Morris agreed to this and he understands paid the debt. If Morris had paid the debt and thereby acquired an equitable right to these old rails he might perhaps have asserted it against the company. It was an easy matter for Morris to have shown that the contract was executed by him and the money paid to

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the Mobile & Ohio Railroad Company and the rails delivered, but this he has failed to do. These old rails, however, on the New Orleans road had not been delivered to Morris either actually or constructively, and Flournoy had sold or converted them into new rails without even Morris' knowledge. No right or title had ever vested in Morris so far as these old rails were concerned. He could not have maintained an action at law or equity to recover them, and even if he had paid the money to the Mobile road and Flournoy then refused to deliver the rails, his remedy would have been by an action on the contract for the recovery of damages. This contract, however, was so incomplete as to raise no equity on the part of the appellants, as against creditors and purchasers. The New Orleans Railroad Company had taken near fifty-four tons of the old rails from this road, had them rerolled or exchanged for new ones at New Albany, and returned to Paducah to be again laid upon the same track. They are attached by a bona fide creditor, and Morris comes in and asserts claim to these newly made rails for the reason that he had made an agreement with the president that he was to have all the old rails on the road if he paid a certain debt. The old rails were never delivered to him; there is no proof that he ever paid the debt and he seems never to have heard of the old rails after the agreement with Flournoy until this attachment was levied. He has no right to this property. The firm at New Albany, it seems, gave one ton of new rails for two of old and this would entitle the appellant to $21\frac{3}{4}$ tons of the iron levied on if necessary to pay his debt. This attached iron was sold by an agreement of parties, and what it brought does not appear, and all we can adjudge is that $21\frac{3}{4}$ tons of this railroad iron was subject to appellee's debt, and this is the only question presented in the case. A judgment by default was rendered against the railroad company.

Judgment affirmed.

Bigger & Moss, for appellant.

Williams, for appellee.

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BEN F. FOREMAN v. HOPE INS. CO.

Jurisdiction—Presumption as to.

In the absence of a plea to the jurisdiction it will be presumed that the party objecting resides in the county where the suit is instituted.

Bills and Notes—Failure of Consideration—Burden of Proof.

Where there is a plea of no consideration, in a suit on a note, the onus is on the defendant to establish by proof that fact.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 25, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY :

From the record presented to us by the appellant, we must presume that he was a resident of Jefferson county at the time proceedings by rule were instituted against him.

He does not plead to the jurisdiction of the Louisville chancery court, nor is there any fact presented by the record which shows that he was a resident of any other than the county of Jefferson at that time. The judgment appealed from can not, therefore, be regarded as void.

In the court below appellant treated the rule of the chancery court as a petition. He made no objection to the character of proceedings resorted to by appellee, but filed an answer going to the merits of the case and willingly submitted the issues raised by his answer to the chancellor for adjudication.

The chancellor did not err in holding that the *onus* was upon appellant to establish by proof his plea of failure or want of consideration for the note, upon which judgment was asked. *2d Littell* 205, *6th John I. Marshall* 132, *3d B. Monroe* 418.

The note itself gave to appellee a *prima facie* right of recovery, and in the absence of all proof the chancellor could not refuse to render judgment thereon.

We are of opinion that appellant can not in this case avail himself of the exceptions filed in this court to proceedings had in the court below. The extraordinary privileges conferred upon certain litigations by the 5th section of the act of March 21, 1870, ought not to be extended to any other than cases com-

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ing closely within the spirit of such act. The legislature certainly did not intend that a party who had actually appeared in court, and by his conduct, induced the chancellor and the opposite party to believe that he intended to waive all formal defects, or omissions, should be allowed after he was defeated upon the merits of the controversy, to take advantage of these technical objections for the first time in this court.

There may be some reason why a party proceeded against by rule, who did not appear, should be allowed this right, but there certainly can be none, in a case like this one under consideration, and we will not conclude that the legislature intended without a good and sufficient reason to overturn one of the best established rules of practice.

The appellant was in court in person, and might have presented to the chancellor every ground of objection or defense embodied in his exceptions here filed. Having failed to do so, he must be held to have waived each and all of them.

If it be conceded that the act of March 16, 1869, repealing the charters of the Hope and Globe Insurance Companies, be unconstitutional (a matter about which it is not necessary that we should express an opinion), such fact will not avail appellant for a reversal of the judgment from which he has appealed.

If such act be unconstitutional, it may be a good reason why the suit of *Stevens v. the Insurance Company* should not be prosecuted, but it is no reason why Stevens, owing premium notes to such company, should not be compelled to pay them.

If the suit of Stevens had never been instituted, the Louisville chancery court would have had jurisdiction to give judgment against Foreman on the note held by the insurance company.

His creditor, the company, is not complaining that the note has been placed in the hands of a receiver for collection, and as it is a party to the suit in which the receiver was appointed and has so far as is shown by the record upon which we are called to act acquiesced in such appointment, the judgment in favor of the receiver will be a bar to any subsequent action on the note by the company. The liability of Foreman to pay the note does not depend upon the constitutionality of the act in

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question, nor upon the propriety or impropriety of the action of the chancellor in entertaining the suit of Stevens, or in the appointment of the receiver.

The record before us presents no sufficient reason why the judgment appealed from should be disturbed. It must, therefore, be affirmed.

Duke & Richards, for appellant.

J. G. Wilson, for appellees.

EPHRIAN CUSHMAN v. J. R. GAITHER, ETC.

Vendor and Purchaser—Title Bond—Purchase Money—Deed—Lien.

By the terms of the title bond appellant was only bound to convey the land by deed of general warranty when the purchase money was all paid, which was not done when the suit was instituted. Appellee was in default and the court should have rendered judgment not only for the purchase money, but should have adjudged a lien on the land with means of enforcing it.

APPEAL FROM HARDIN CIRCUIT COURT.

September 27, 1871.

OPINION BY JUDGE PETERS:

That appellant executed the bond for a conveyance of the 160 acres of land therein described, and the receipt endorsed thereon for five hundred dollars part of the purchase price, the evidence leaves no room to doubt, and thus far we fully concur with the circuit judge.

But by the terms of the bond appellant was only bound to convey the land by deed of general warranty when the purchase money was all paid, which was not done when this suit was instituted, and as there is a prayer in the petition in case the court should be of opinion that appellant had sold the land to Gaither for judgment for the purchase money, and it is admitted that five hundred dollars were unpaid, the court should not only have adjudged that sum to appellant with the interest, but should have adjudged a lien on the land therefor, with the means of enforcing it. Appellee was in default in not paying all the

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price, or tendering the unpaid balance in court, whereby he would have entitled himself to a conveyance. No question is raised as to the sufficiency of appellant's title, and the contract should have been enforced according to the rules of equity in such cases.

Wherefore the judgment is *reversed*, and the cause is remanded for judgment in conformity to this opinion—and as appellee was in default in failing to pay all of the purchase money, each party should pay his own costs in the court below. The date fixed in the judgment for the commencement of interest seems to be correct.

Wilson, for appellant.

Murray, for appellee.

WM. BRADSHAW v. A. WOODWARD.**Exceptions, Bill of—When to Be Filed—Vacation.**

A bill of exceptions to be valid as such must be signed by the judge and filed during a term of the court and noted of record. The court has no power to authorize a bill of exceptions to be prepared and filed in vacation.

APPEAL FROM McLEAN CIRCUIT COURT.

November 8, 1871.

OPINION BY JUDGE PETERS:

This court has repeatedly held that a bill of exceptions to be valid, as such, must be signed by the judge and filed during a term of the court and noted of record, and that the circuit court has no power to authorize a bill of exceptions to be prepared and filed during vacation. *Sec. 364, Civ. Co.*, does not admit of such a construction. *Freeman v. Brenham*, 17 Ben M. 607. And many cases decided since.

As the bill of exceptions in this case was filed in vacation, we can not consider it for any purpose, and in the absence of a bill of exceptions must presume the rulings of the court below as correct.

Wherefore the judgment must be *affirmed*.

Tanner, for appellant.

Boyd, for appellee.

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A. J. COCANAUGHER *v.* F. S. HILL, ETC.

Contracts—Sale of Growing Crop—Completion of Bargain Fact for Jury—Peremptory Instruction.

Whether the contract for the sale of the corn was complete or left something to be done material to complete the bargain were facts, upon which it was the province of the jury to pass and, therefore, the court erred in giving a peremptory instruction.

APPEAL FROM WASHINGTON CIRCUIT COURT.

October 21, 1871.

OPINION BY JUDGE PETERS:

At the time of the alleged sale of the corn it could not be severed from the grounds and removed, consequently an actual delivery by a change of its location and removal to another place was impracticable. Whether, therefore, the contract for the sale of the corn was complete, or whether it was *in fieri* only; leaving something to be done material to complete the bargain were facts, upon which it was the province of the jury to pass. We are not prepared to say that if there was a contract for the sale of the entire field of corn standing, at a stipulated price with a reservation of a designated number of barrels for the use of the vendor, that such a contract would not pass the title to the vendee.

It seems to us, therefore, that the court below erred in giving the peremptory instruction.

Wherefore the judgment is reversed and the cause is remanded for a new trial, and for further proceedings consistent herewith.

Brown & Lewis, for appellant.

Lindsay, for appellee.

JAS. CASTEEL *v.* PETER L. SCAGGS, ETC.

Pleadings—Action to Recover Land—Sufficiency of Petition—Contradiction.

The petition states that the plaintiff is the owner and entitled to the possession of the land and after describing the land it then alleges that the larger portion thereof is the property of the plaintiff, thus contradicting the previous averment that he owned all of the land.

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Held, that it cannot be determined, from the petition, what portion of the land belonged to the plaintiff.

APPEAL FROM LAWRENCE CIRCUIT COURT.

October 26, 1871.

OPINION BY JUDGE PETERS:

A petition should contain a concise statement of the facts which constitute plaintiff's cause of action, and set forth his claims with such certainty as to enable the court to determine the precise extent of relief (taking the facts as stated to be true) to which he is entitled, and the judgment that should be rendered in the case.

The petition in this case sets out by stating that the plaintiff is the owner and entitled to the possession of a tract of land in Lawrence county, Kentucky, containing *about* fifty acres—and after describing the land by metes and bounds—it is then alleged that “the larger portion of which is the property of the plaintiff”—thus contradicting the previous averment that he owned all of the land. Moreover he described the tract as containing *about* fifty acres, of which he owns the larger portion. From that description how could the court determine how much land he was entitled to? First, there might be more, or there might be less than fifty acres. And *second*, what portion of the land that is really in the tract that appellant is entitled to is not stated; whether two-thirds or nine-tenths or any other quantity the court is left to guess. The demurrer was properly sustained and the judgment must be *affirmed*.

Roe, for appellant.

CENTRAL NATIONAL BANK OF DANVILLE *v.* J. B. BAILEY.

Executions—Sheriff—Levy—Mistake As to Quantity of Land Levied On—Good Faith.

As the law does not furnish the sheriff with the power or the means to go on land upon which he may levy and make surveys thereof, he must act on the best information he can otherwise obtain, and when he has done so he cannot be made responsible for the mistake of others.

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APPEAL FROM LINCOLN CIRCUIT COURT.

September 14, 1871.

OPINION BY JUDGE PETERS:

From the facts agreed in this case, it appears that the sheriff was informed by an old survey of the land that the tract contained forty-five acres, and he was also informed by Norman, the principal in the debt, that there were forty-five acres of the land and that this information was in good faith, and upon which he had a right to rely—and if it had contained the quantity as represented, the property levied on would have been more than sufficient to pay appellant's debt.

As the law does not furnish the sheriff with the power, or the means to go on lands upon which he may levy and make surveys thereof, he must act on the best and most reliable information that he can otherwise obtain as to such matters, and when he has done so, he cannot be made responsible for the mistakes of others.

Judgment affirmed.

Durham & Jacobs, for appellant.

Hill & Alcorn, for appellee.

GEO. E. COOK v. I. W. SCOTT, ADMINISTRATOR OF ROBT. TUNIS.**Trials—Instructions—Objection and Exception.**

An objection to an instruction must be made at the time the court is asked to give it, and if it is then given the ruling of the court must be excepted to.

APPEAL FROM FAYETTE CIRCUIT COURT.

October 7, 1871.

OPINION BY JUDGE PETERS:

The bill of exceptions in this case does not show that the instructions asked for by appellee were objected to at the time by appellant, but the appellant excepted after they were given. This

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is not sufficient under *Sec. 364, Civ. Co.* The instructions must be objected to at the time the court is asked to give them, and if they are then given must except to the ruling of the court, *Kennedy & Bro. v. Cunningham*, 3 Met. 538. As no objections were made when they were offered, any error in giving them must be deemed as waived. All the instructions asked for by appellant were given, and no objections were made to the evidence. The judgment, therefore, must be affirmed.

H. B. Cooke, for appellant.

Kinhead & Buckner, for appellee.

B. S. CAMPBELL AND WIFE *v.* EVANSVILLE, ETC., RAILROAD CO.

Trial—Discontinuance by Plaintiff Does Not Affect Counterclaim.

A defendant is not prejudiced by an order discontinuing the plaintiff's case as he may proceed to trial on his counterclaim as if no order of discontinuance had been entered.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

November 9, 1871.

OPINION BY JUDGE PETERS:

In this case the following order was made: "On motion of plaintiff's attorney it is ordered that this cause be discontinued," from which appellants who were a part of the defendants in the court below have appealed; insisting that their answer presented a counter-claim and the court below could not, by ordering a discontinuance of the original suit, dismiss their counter-claim.

By *Sec. 401, Civ. Co.*, it is provided that "in a case where a set-off, or counter-claim has been presented, the defendant shall have the right of proceeding to trial with his claim, although the plaintiff may have dismissed his action or failed to appear.

It is most palpable that if appellants have presented a counter-claim by their pleading, the order referred to did not prevent them from proceeding with it to trial. Nor was it necessary to set aside the order discontinuing the action made on motion of appellees to enable them to proceed with their counter-claim if

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they had presented one. Appellants were not prejudiced by the orders of the court discontinuing the appellee's suit. Nor in overruling the motion to set aside said order.

Wherefore the judgment is *affirmed*.

Landes & Clark, for appellant.

Feland & Evans, for appellee.

N. BOWMAN v. BENJ. PEOPLE'S EXR.**Trial—Law and Facts Submitted to Court.**

Where the law and facts are submitted to the circuit judge, the court of appeals will not reverse unless the conclusion of the court is flagrantly against the evidence.

APPEAL FROM CALLOWAY CIRCUIT COURT.

November 14, 1871.

OPINION BY JUDGE PETERS:

The law and facts in this case were submitted to the circuit judge—and the main question involved was whether the note sued on had been paid. The facts relied on as evidencing the payment are the acknowledgment of payment in the deed from appellee to appellant for the lot for part of the price of which the note was executed, the lapse of time and the solvency and ability of appellant to pay during the time. To overcome these facts appellee relies on the possession of the note, and the evidence of Duncan, the draftsman of the deed, who proves that at the time the deed was made no money was paid.

It is not for this court to decide in such cases for whom the evidence preponderates; because unless the conclusion of the court is palpably and, as is sometimes said, flagrantly against evidence, this court can not interfere. We can not say that the judgment is decidedly against the weight of evidence, consequently we are not authorized to disturb it. Wherefore the judgment is *affirmed*.

Anderson, for appellant.

Stubblefield, for appellee.

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COMMONWEALTH v. PAGE'S ASSIGNEE AND BANK OF KENTUCKY.**Officers—Auditor of Public Accounts—Defalcation—Settlement by Sureties—Right to Money on Deposit.**

Upon the discovery of the auditor's defalcation the state might have asserted claim to the balance remaining in the bank to his credit, but the state waived this right and proceeded against his sureties.

Held, that it was manifestly wrong, after the sureties of the auditor had been compelled to account for all the money unlawfully appropriated by him, for the state then to compel the surrender of this money.

Banks and Banking—Note—Surety—Deposit Appropriated to Note—Statute of Limitations.

The bank did not within seven years after the cause of action accrued on the note of Moorehead, on which Page was surety, appropriate this balance to the payment of the note. The plea of the statute of limitations was a bar.

October 25, 1871.

APPEAL FROM FRANKLIN CIRCUIT COURT.**OPINION BY JUDGE LINDSAY:**

Page was not the legal custodian of the public moneys of the State of Kentucky. The funds received by him from the collecting officers of the State and deposited in the bank of Kentucky to his credit as auditor he neither received nor held in pursuance to law. Upon the discovery of his defalcations the State might have asserted claim to the balance remaining in the bank to his credit, not because it was deposited to his credit as auditor, but because such balance was the remainder of funds unlawfully received and appropriated by him. It was, however, within the power of the State to waive this right, and proceed directly against his official sureties. This remedy it elected to pursue, and treated the money in the bank as having been converted by Page to his own use.

It would be manifestly wrong after the sureties of Page had been compelled to account for all monies unlawfully received and appropriated by him, for the State then to compel the surrender of such monies, as is being attempted in this case.

The bank did not within the seven years after the cause of

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action accrued on the note of Moorehead, on which Page was surety, appropriate this balance to the payment of that note.

The plea of the statute of limitations was, therefore, a bar to the claim asserted in its cross-petition in this action.

Page's assignee was entitled to recover the amount in controversy and the judgment in his favor must be affirmed.

Chief justice did not sit in this case.

Rodman, for appellant.

Lindsay, James, for appellee.

JOHN AMSBRO v. THOS. BYRNE'S ADMR.

Executors and Administrators—Suit to Collect Debts Owning Estate—Set-Off—Affidavit and Demand Not Necessary.

When the personal representative has commenced the litigation, a claim against the intestate can be pleaded by way of set-off or counterclaim as a defense to the action without the affidavit and demand prescribed by the civil code.

APPEAL FROM MARION CIRCUIT COURT.

October 13, 1871.

OPINION BY JUDGE PETERS:

This court decided in the case of *Miller & Co. v. Watkins*, 4 *Bush* 642, that where the personal representative has commenced the litigation, a claim against the intestate could be pleaded by way of set-off or counter-claim as a defense to the action without the affidavits and demand prescribed in *Sec. 473* of the *Civil Code*, and according to the doctrine of that case it was erroneous to dismiss the appellant's set-off.

But even if the affidavits and demand were necessary to enable appellee to avail himself of the want of them, he should have filed an affidavit and had a rule against the appellant to show cause why his set-off should be dismissed after having withdrawn his reply.

Thomas v. Thomas' Executor, 15 *B. Mon.* 178.

The judgment must therefore be *reversed*, and the cause re-

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manded with directions to overrule the motion to dismiss appellant's set-off, and for further proceedings consistent with this opinion.

Belden & Cleaver, for appellant.

Russell & Averitt, for appellee.

J. A. BARBER v. BEN MOORE.

Trials—Failure to State Cause of Action—Demurrer May Be Filed at Any Time—Non-suit—Arrest of Judgment—Insufficient Petition Grounds for Reversal.

If a plaintiff fails to state a cause of action, it is not too late, in the progress of the trial, at any time to demur, or to move for non-suit, or in arrest of judgment, and where a plaintiff has recovered judgment below and has failed to state facts sufficient to constitute a cause of action the Court of Appeals will reverse the judgment.

Exchange of Property—Deceit—Action to Recover On—Title Must Be in Plaintiff.

Appellant in his amended petition admitted that he was not the owner of the horse he traded but had general permission to trade him. These are only conclusions of the pleader and not a statement of such facts as would divest the owner of the title to the horse.

APPEAL FROM CALLOWAY CIRCUIT COURT.

November 14, 1871.

OPINION BY JUDGE PETERS:

If a plaintiff fails to state a cause of action, it is not too late in the progress of the trial at any time to demur, or to move for non-suit, or in arrest of judgment, and where a plaintiff has recovered judgment below and has failed to state facts sufficient to constitute a cause of action, this court will reverse the judgment unless the defect is cured by the answer.

In this case appellant seeks to recover damages for deceit on the part of appellee in a horse trade. The latter in his answer says appellant is not damaged because the horse he swapped

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did not belong to him, but was the property of A. A. Barber. In his amended petition, appellant admits the horse he traded belongs to his brother, A. A. Barber, and says when he traded him he simply became indebted to his brother for the price of the horse—having general permission to trade the horse—these are only conclusions of the pleader, and not a statement of such facts as would divest A. A. Barber of the title to the horse—and for all that appears he might bring his action and recover the horse from appellee—facts should have been stated to show that A. A. Barber was divested of his title to the horse.

Wherefore the judgment is affirmed.

W. J. Stubblefield, for appellant.

Anderson, for appellee.

ADAM BAUM v. WHITE & HUNT.

**Pleadings—Answer Must Deny Every Material Allegation in Petition—
Plea in Avoidance.**

To constitute a good answer every material allegation of the petition must be denied in such a manner, or if facts are pleaded in avoidance, they must be so stated as to show that if true the plaintiff is not entitled to a judgment.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 13, 1871.

OPINION BY JUDGE PETERS:

Appellant in his answer denies that the goods were sold and delivered to a firm composed of the persons sued as constituting that firm, and says that if they were sold at all they were sold to "The Cottage Furnace Iron and Manufacturing Company" claiming to be a corporation, but he does not allege in direct and positive terms that the Cottage Furnace Iron Manufacturing Company was a corporation—or that the goods were sold to a corporation which was responsible for the price thereof.

To constitute a good answer every material allegation of the petition must be denied in such manner, or if facts are pleaded

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in avoidance, they must be so stated as to show that if true the plaintiff is not entitled to a judgment against the defendant. Tested by the rules the answer in this case is not sufficient. All that it contains may be true, and still appellant may be legally bound for the debt appellees claim.

The demurrer was, therefore, properly sustained to the answer. And the judgment must be *affirmed*.

W. H. Holt, for appellant.

Apperson, Reid, for appellees.

R. J. CARTER *v.* F. F. HAZELRIGG'S ADM'R.

Bailment—Depositum—Bailee Not Responsible for Loss.

Where property is placed by its owner in the hands of another person for his own accommodation, the bailee is not responsible to the bailor unless loss occurs through his negligence.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 10, 1871.

OPINION BY JUDGE PRYOR:

The evidence in this case shows that the mules and wagon in controversy were left in the possession of Hazelrigg at the instance of the appellant. Hazelrigg placed them in charge of a neighbor to be kept by him until appellant could send for them. It was not incumbent on him to take charge of this property, and his action in regard to it resulted from his kindness to the owner, and not for any reward promised or expected. It also appears that Hazelrigg himself left the town and died some time afterwards. Whilst this stock was at Mount Sterling, the confederate forces were at the town and appropriating all property necessary to supply their wants and, it may be, took possession of appellant's stock. The loss of the property resulted from no act of Hazelrigg or by reason of any negligence on his part, and there is no reason for making his estate responsible for its value.

The judgment is affirmed.

Holt, for appellant.

Apperson, Reid, for appellee.

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A. F. BUTNER ET AL. v. R. D. COOK.

Life Estates—Rents and Improvements.

A tenant for life has no right to compensation for improvements made upon land in which he has only a life estate, and no recovery can be had by the tenant during his occupancy of the land or by his heirs or representatives after his death.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

October 28, 1871.

OPINION BY JUDGE PRYOR:

The judgment rendered by the court below in favor of the appellee Cook upon his cross-petition is erroneous. The wife of Cook had a life estate in this land under the will of her father, and herself and husband under the will had occupied the land for several years. The use of the land more than compensated them for the improvements made. The question of rents and improvements, however, can not be considered in a case like this. The tenant for life has no right to compensation for improvements made upon the land in which he has a life estate only. No recovery can be had by the tenant during his occupancy of the land nor by his heirs or representatives after his death. The judgment of the court below upon Cook's cross-petition is reversed, and the court directed to dismiss the same so far as it seeks to recover for improvements made upon the land of the wife.

Williams, Butner, Disham, for appellants.

Kertley, for appellee.

COMMONWEALTH v. H. M. WELLS.**Criminal Law—Unlawful Gaming—Permitted by Servants and Agents—Guilty Knowledge of Principal.**

While the unlawful conduct of the defendant's agents in the control of his house may have been strong evidence of his own guilty knowledge, it did not constitute his guilt.

APPEAL FROM MADISON CIRCUIT COURT.

November 8, 1871.

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OPINION BY JUDGE HARDIN:

This was a prosecution against the appellee, a licensed tavern-keeper, for permitting a faro bank to be set up and kept in his house. A trial of the case having resulted in his acquittal, the commonwealth prosecutes this appeal for a reversal of the judgment. The only question presented is as to the action of the court in refusing to instruct the jury in substance and effect, that if the unlawful gaming in the defendant's house was permitted by other persons than himself, who were at the time engaged in his service, and acting as his agents in keeping the house, he was responsible therefor. While the unlawful conduct of the defendant's agents in the control of his house may have been strong evidence of his own guilty knowledge, it did not, in our opinion, constitute his guilt, and the court properly refused the instructions. Therefore the judgment is affirmed.

Burnam, for appellee.

A. J. BEAL *v.* JOHN LAMPKINS.

Bills and Notes—Signing Note on Back Instead of End—Presumption—Insolvency of Obligor.

Where a party writes his name across the back of a note instead of signing it at the end, it will be presumed that he intended to become bound as an endorser or guarantor and not as a co-obligor, and in that case the payee has no cause of action against him until he has prosecuted the obligor to insolvency.

APPEAL FROM MARION CIRCUIT COURT.

Reversed October 13, 1871.

OPINION BY JUDGE LINDSAY:

The name of the appellant A. J. Beal having been written across the back of Carter's note instead of signed at the close of it, the legal presumption is that he intended to become bound as an endorser or guarantor, and not as a co-obligor with Carter. To escape this presumption appellee by his amended an-

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swer charges that Beal's name was thus written because there was not room at the close of the note, but that he so signed it in pursuance to a contract between appellee and Carter, intending thereby to bind himself as a co-obligor. It is these allegations which make the petition good, and upon the truth of the same depends appellee's right to recover against Beal in this action. Appellant by his answer denies any knowledge, information or belief as to the alleged agreement between appellee and Carter. He denies that he undertook to be bound on the note as a co-obligor or that he signed his name on the back of it with any such intention, and alleges that his intention was to bind himself as an endorser or assignor and in no other way.

If this answer be true, appellee can have no cause of action against Beal until with proper diligence he prosecutes Carter to insolvency. The court erred in sustaining appellee's demurrer. Judgment is reversed and this cause remanded with instructions to overrule said demurrer and for further proceedings consistent with this opinion.

Harrison, for appellant.

Lindsay, for appellee.

J. D. KLINE ET AL. V. BAKER FLAUGHER.**Husband and Wife—Sale of Wife's Real Estate—Coercion.**

Where the evidence fails to establish any act or acts upon the part of the husband tending toward coercion, the questions of delicacy and propriety cannot be considered by courts of justice.

APPEAL FROM BRACKEN CIRCUIT COURT.

September 30, 1871.

OPINION BY JUDGE LINDSAY:

The deed from Mrs. Flaughner and her husband to Stephen B. Flaughner is valid if made by the wife without coercion or undue influence upon the part of the husband.

The evidence wholly fails to establish any act or acts upon his

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part tending in the slightest degree towards coercion. Whilst it is more than probable that he contracted the marriage from mercenary motives, it does not appear that the wife was ever cognizant of, or even suspected that such was the fact. The evidence leaves no doubt but that she entertained for her husband a sincere affection, and we are inclined to the opinion that the conveyance herein sought to be vacated, was freely and willingly executed by her on account of such affection.

There was nothing unnatural nor unreasonable in the action of the wife in the premises, and although her health was exceedingly delicate it seems that her mind was not impaired at the time of the execution of the deed.

Questions of delicacy and propriety can not be considered by courts of justice in such cases as this. The appellee under the law is entitled to the relief granted him by the judgment of the court below. Wherefore said judgment must be affirmed.

Clark, Marshall, Taylor, for appellant.

Mensies, Furber, for appellee.

ADAMS EXPRESS CO. v. THE CITY OF LOUISVILLE.

Municipal Corporation—License—Suit for Restitution—Petition—Sufficiency of.

In a suit for the restitution of license wrongfully collected, the petition is bad when it fails to allege that the general council enacted no other ordinance on the same subject, and that it failed to adopt and ratify the action of the inspector.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

September 23, 1871.

OPINION BY JUDGE HARDIN:

Although the petition alleges that the license inspector exacted and received the sum of \$500 for license under the ordinance set out in the petition, it neither alleges that the general council enacted no other ordinance on the same subject, nor that it did not adopt and ratify the action of the inspector in putting the Adams Express Company in the first class of such corpora-

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tions of which a license for \$500 was exacted, and we can not, therefore, presume that the action of the inspectors in granting the license and exacting the fee therefor, of \$500, was not substantially and really the action of the general council, done under the law authorizing it to provide for licensing express companies.

Wherefore, waiving the consideration of the constitutional questions presented in the argument, we are of the opinion that the statement of facts made in the petition does not constitute a cause of action for restitution of the license fee, and the demurrer to the petition was properly sustained.

Wherefore the judgment is affirmed.

Sachs, for appellant.

Fox, for appellee.

LEWIS CHEEK *v.* JOHN MCKAY, ETC.

Pleading—Amended Petition Presenting New Cause of Action—Service of Process.

Where a petition is so amended as to present a new cause of action there should be service of process, either actual or constructive, before judgment.

Judicial Sales—Not Made on First Day of Court—Void—Judicial Notice of Term.

Courts will take judicial notice of terms of court, and a sale of land made on other than the first day of a term is void.

APPEAL FROM KENTON CIRCUIT COURT.

September 23, 1871.

OPINION BY JUDGE PRYOR:

The amended petition filed in this case by the appellees was in fact a supplemental petition presenting a new cause of action, and there should have been service of process, either actual or constructive before judgment.

It also appears that the sale made by the sheriff of appellant's equity of redemption in the real estate described in the pleadings was made on Saturday, the 5th of September, 1868, that

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this was not the first day of either the circuit or county courts of Kenton. The county court began on the fourth Monday in the month (*see Session Acts 1863-4, page 447*), of which fact this court will take judicial notice. Such sales are void as decided by this court in the case of *Will vs. Sweeney, 2 Duvall, page 162*. The case is reversed with directions to set aside the judgment of the court below and all the proceedings thereunder and for further proceedings not inconsistent with this opinion.

Rodman, for appellant.

Hallam, for appellees.

COMMONWEALTH v. AYLETTE B. TAYLOR.**Criminal Law—Bail—When Clerk May Take.**

Bail may be taken by the clerk of the Circuit Court in cases in which the accused has been committed to jail by the Circuit Court, and then only after the term has expired and in the absence of the judge.

Such clerk has no authority to take bail in cases where the accused has not been in the custody of the Circuit Court.

APPEAL FROM WASHINGTON CIRCUIT COURT.

June 8, 1871.

OPINION BY JUDGE LINDSAY:

The amendment to the 61st section of the *Criminal Code of Practice* approved February 5th, 1866 (*Session Acts 1865 and 1866, page 26*), authorizes bail to be taken by the clerk of the circuit court in cases in which the accused has been committed to jail by the circuit court, and only then after the term had expired and in the absence of the judge of said court.

Such clerk has no authority to take bail in cases in which the accused has been committed by an examining court, and has never been in the custody of the circuit court.

Wherefore the judgment of the circuit court is affirmed.

Attorney-General, for appellee.

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F. W. BLUNK *v.* S. J. REGATT.

Trial—Weight of Testimony—Peremptory Instruction.

It is error to give a peremptory instruction to find for the defendant where the evidence, when all considered, conduces to some extent to prove the trespass as laid in the petition.

APPEAL FROM KENTON CIRCUIT COURT.

June 7, 1871.

OPINION BY JUDGE LINDSAY:

Without indicating any opinion as to the weight of the testimony it seems to us that the jury might possibly have concluded that the appellant was entitled to recover.

The evidence when all considered certainly conduced to some extent to prove the trespass as laid in the petition. In either event the peremptory instruction to find for the defendant was erroneous. 7 *J. J. Marshall* 411; 2 *B. Monroe* 129.

We perceive no other available error, but for the reasons stated the judgment is reversed and the cause remanded for a new trial.

Fisks, for appellant.

Benton, for appellee.

COMMONWEALTH FOR USE OF O. C. BOWLES *v.* W. P. JOHNSON, ETC.

Sheriffs and Constable—Failure to Return Execution—Official Bond—Suit on.

The bond sued on in this case was executed in the year 1866. The failure to return the execution complained of did not occur until August, 1867. It will be presumed that the sheriff entered upon his second term in January, 1867, and that the county court required him to execute a new bond at the time. This suit should have been brought on the last-named bond.

APPEAL FROM PIKE CIRCUIT COURT.

October 9, 1871.

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OPINION BY JUDGE LINDSAY:

The bond sued on in this case was executed in the year 1866. The failure to return the execution complained of did not occur until August, 1867. We must presume that Johnson entered upon his second term as sheriff in January, 1867, as provided by the Constitution, and that the county court of Pike county in pursuance to law required him to execute an official bond at that time. The suit should have been upon that bond and not on the one made the basis of this action.

The relief sought was a statutory penalty, and as the action was founded on the wrong bond no judgment could be rendered even against the sheriff. The demurrer to the petition was properly sustained.

Judgment affirmed.

Burns, for appellant.

Apperson, for appellees.

COMMONWEALTH FOR USE, ETC., v. W. P. JOHNSON, ETC.**Sheriffs and Constable—Official Bond—Defalcation—Re-election—Second Bond.**

Where a sheriff is re-elected it is the duty of the county court to require him to execute a new bond, and in the absence of proof to the contrary it will be presumed that he has done so, and when he defaults the action must be brought on the bond in force at the time of the defalcation.

APPEAL FROM PIKE CIRCUIT COURT.

October 5, 1871.

OPINION BY JUDGE LINDSAY:

The petition shows that Johnson, the sheriff, executed the bond upon which this action is based on the 20th of August, 1866, and that the official defalcation complained of did not occur until August, 1867. By the constitution and laws of this state Johnson's first term of office must have expired in January, 1867, and if he was re-elected it was the duty of the county court

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to require him to execute a new bond and again take oath of office.

It is true a sheriff holds until his successor is qualified, but no explanation is offered as to the reason for suing on the bond of August 20th, 1866, and in the absence of such explanation, it will not be presumed that the Pike county court failed to require Johnson to execute a second bond. We are therefore of the opinion that under the state of facts set out in the petition the action could not be maintained. The demurrer was therefore properly sustained.

Judgment affirmed.

Burns, for appellant.

Apperson, for appellee.

JOHN P. BALLARD, ETC., v. JAMES LOWERY.

Vendor and Purchaser—Identity of Property Sold.

Where a purchaser fails to make an investigation as to which of two houses he has purchased, when the facts are before him, he is culpably careless and the law can afford him no relief.

APPEAL FROM SHELBY CIRCUIT COURT.

October 5, 1871.

OPINION BY JUDGE PETERS:

The alleged mistake according to the evidence is one that could scarcely occur with a man ordinarily attentive to his own interests, and appears without legal excuse.

A negotiation was commenced between Ballard and appellee to trade eleven acres and 18 poles of land by appellee in the suburbs of Shelbyville to a house and lot in the town, and it may have been occasionally designated as the "Ballard house." After the parties had been talking about the trade, Ballard announced to appellee that Kinkead and Churchill were joint owners of the house with him, and they did not favor or approve the trade, and the negotiations for a time were broken off.

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There is no pretense that Kinkead and Churchill ever had any interest in the brick house, or that it was ever so understood.

Subsequently propositions were renewed and appellee was informed by Ballard that his joint owners had consented to his making the trade, naming them, and appellee still made no inquiry to learn how they were, or had become interested in the house, and during the negotiations on the day when the trade was consummated Ballard informed appellee more than once that the Misses Prewitt occupied as their tenants the lower story of the house, paying as rent for it \$200 per annum, and that William Wallace occupied the upper story, paying therefor \$150 annual rent, that appellee lived in Shelbyville, and practised medicine, frequently passed the frame house occupied by Misses Prewitt, who carried on a millinery in the house, had their sign upon it, and showcases of bonnets, flowers, and ribbons exposed to public view, and living as he did in the town and in the same part of the town, it seems almost astonishing that he should not have known, or been put on the inquiry as to the identity of the house. Besides the brick house on the corner of 4th and Main street was then occupied by Dr. Stivers, a dentist, and his sign suspended over the front door two feet by two and a half feet, with his name and occupation inscribed in gilt letters, and appellee had visited the house while Stivers had occupied it professionally and must have known by whom it was occupied when the trade was being made. He was then in the office where the titles were recorded, and notwithstanding the accumulated facts pressing on him to warn him that he might be in error in regard to the identity of the property, he quietly contented himself in his supposed security without making an examination into the title, or to respond to the information which if heeded was more than sufficient to undeceive him, and never aroused up until the trade had been consummated, and he called in at Kinkle's to inform of it, and Kinkle told him Ballard & Co. never owned the brick house on the corner of 4th and Main streets, and he then started to announce his mistake to Ballard.

It is difficult to conceive how such a mistake could be made by even the most careless. Ballard did not live in the brick house. The public records showed he never had title to it, while

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they showed he and Kinkead and Churchill did have title to the frame house, and Ballard informed him, and he knew these tenants did not occupy the brick house, but knew beyond all peradventure that Dr. Stivers then occupied the brick house.

And having failed with all these facts before him, he was culpably careless, and the law can afford him no relief.

Wherefore the judgment is *reversed*, and the cause is remanded with directions to dismiss appellee's petition.

Caldwell, Harwood, for appellant.

Z. Wheat, A. G. Roberts, for appellee.

BOWMAN, ETC. v. BOWMAN'S ADMR. AND BOWMAN'S ADMR.
v. R. H. FIELD.

Executors and Administrators—Amount to be Allowed for Collecting Debts.

Five per cent is the usual allowance made to personal representatives as compensation for the amount collected by them, and sometimes a commission of 5 per cent will be allowed only on disbursements, but it may be allowed on the amount collected, and in cases of much trouble and difficulty in collecting, when the debts are small, seven per cent may be allowed, but to authorize such an allowance the difficulties enumerated must be proven.

Executors and Administrators—Administrator Acts as Commissioner.

Where a personal representative acts as commissioner on making sales of land belonging to the decedent's estate, a reasonable allowance should be made to him in addition to his commission.

Usury—Statute of Limitations.

More than three years had elapsed from the payment of the debts before the administrator made an effort to reclaim the usury included in the notes. The plea of the statute of limitations is a complete bar.

APPEAL FROM BULLITT CIRCUIT COURT.

September 7, 1871.

OPINION BY JUDGE PETERS:

Appellants complain that the commission allowed the administrators of 7 per cent. on the amount collected of his intestate is too liberal.

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Five per cent. is the usual allowance made to personal representatives as compensation for the amount collected by them, and it is sometimes said that the commission of 5 per cent. will be allowed on actual disbursements, but it may and is often allowed on the amount collected, and it is doubtless competent for the court in settling the accounts of administrators to allow 7 per cent. as compensation, in cases of much trouble and difficulty in making collections where the debts are small and trouble great, and settlements difficult, but to authorize such allowance the existence of the difficulties enumerated, or some of them, should be proved. In this case there is no sufficient evidence exhibited, or reason given for the extraordinary allowance to the administrator. And appellants' exceptions to that item of the report should be sustained and his allowance reduced to 5 per cent. on the amount disbursed by the administrator. If he acted as commissioner on making the sale of the tracts of land, a reasonable allowance should be made to him in addition for that service.

Wilson & Field, after having presented an account for services as follows: Geo. Bowman's Admr. to Wilson & Field, Dr. For bringing suit to settle the estate of G. W. Bowman, preparing claims of Bowman's estate against other estates, and advice to administrator concerning claims against the estate, and advice in reference to the general estate and examination of claims against the estate \$200, which was allowed in the report of debts made by the commissioner in April, 1864. On the 11th of June, 1869, it appears that A. H. Field, Esq., filed an additional claim, which is as follows: "To additional services in management of and conducting suit of *G. W. Bowman's Administrator v. H.*"

This claim was rejected by the master, Field excepted to the report, the exceptions were sustained by the court below and an allowance made to Wm. Wilson of \$50 and to A. H. Field \$150, in the judgment, and of these two allowances appellants complain.

The first allowance embraced their claim for bringing the suit and prosecuting it to the time when the allowance was made—other services were doubtless rendered by them valuable to

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the estate—and we are not authorized to conclude contrary to the opinion of the circuit judge, who sustained an exception to the master's report for rejecting the claims of Field and Wilson that they should not be allowed, the judgment, therefore, allowing these claims is approved.

More than three years had elapsed from the payment of the debts of R. H. Field before the administrator made an effort to reclaim the usury included in the notes. And Field has pleaded, and relies on the statute of limitations as a bar, which plea must be available to bar the claim even if it had been satisfactorily made out. *Myer's Supp.* 292. The act referred to was approved the 17th of March, 1862, and took effect from its passage. But the judgment so far as Carpenter is allowed 7 per cent. for commissions is *reversed* and the cause is remanded for further proceedings consistent herewith.

The judgment on the appeal of Bowman's *administrator* against R. H. Field is *affirmed*.

R. H. Field, A. H. Field, for appellee.

J. E. AUBREY v. COMMONWEALTH.**Criminal Law—Gaming on Premises—Sufficiency of Indictment**

The indictment in this case informs the appellant definitely of the offense with which he is charged and a conviction would have barred a subsequent prosecution for suffering gaming in his house, and is therefore sufficient.

Criminal Law—Illegal Questions Propounded to Witness—Objection—Motion to Exclude Answer.

Where an illegal question is propounded to a witness it is not enough to object in case he is permitted to answer. There must be a motion to exclude it from the jury.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 8, 1871.

OPINION BY JUDGE PETERS:

The indictment in this case charged that the appellant, on the 22d day of February, 1870, unlawfully suffered divers games

of hazard, chance and cards to be played in a house in his possession and control on Short street in the city of Lexington and county aforesaid, the county of Fayette having been previously named, at which games money, whiskey, cigars, ale, beer treats, and other things of value were won and lost, etc.

The rule authoritatively established in such cases is that an indictment must set forth the offense with such certainty as to apprise the defendant of the nature of the accusation for which he is to be tried, and to constitute a bar to any subsequent proceeding for the same offense.

Commonwealth v. Perrigo, 3 Met. 5, and in that case an indictment which charged that the defendant suffered certain named persons to play in a house or on premises in the county aforesaid, then in the occupation and under the control of the said Perrigo a game of cards at which game of cards played as aforesaid money or property was lost—was on demurrer held to be insufficient because the place where the playing was done, and the thing lost, were both described in the alternative and the defendant could not prepare to make an available defense against a charge so vague and uncertain. Nor would a conviction for suffering a game for money to be played in his *house* have barred a subsequent prosecution for suffering a game for property to be played elsewhere on his premises.

But the indictment in this case is different; it informs appellant definitely of the offense with which he is charged, and a conviction would have barred a subsequent prosecution for suffering gaming in his house, and at the time named in the indictment—and according to the principle settled in the case *supra*—it must be regarded as sufficient.

The question propounded by the attorney for appellee to the witness Murphy was leading and otherwise improper—but there was no objection made to the answer, nor any motion to exclude it from the jury, and the failure to do so must be deemed a waiver of any objection to it—besides the answer was not prejudicial to appellant in view of the instructions given to the jury—which were to the effect that the appellant must have been aware of the understanding or agreement between the players that the party who was beaten at the game was to pay the treat before he could be convicted.

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In reference to the question propounded to the witness Bruce by the attorney for appellee and objected to by appellant, it and the answer were illegal—and after the witness had answered the question, the proper mode to proceed was to have moved the court to exclude the answer—as incompetent—but failing to do so, the objection to the evidence must be regarded as waived. And even if it were not waived, the fourth instruction given to the jury on motion of appellant for that purpose doubtless virtually excluded the improper and illegal evidence from the jury—or so qualified it as to render it harmless, for by that instruction the jury was told that it must be proved that the defendant had knowledge that a particular game, or games, were played, at which he knew money *or* property was won *or* lost by agreement, and this knowledge can not alone be proved by the existence of a custom, unless the commonwealth had proved that the defendant knew that such a custom existed—and as there was no evidence that the appellant had knowledge of the existence of such a custom—the evidence objected to could not have been prejudicial to him.

All the instructions asked for by appellant were given, and we perceive no substantial objection to the one given on the motion of the attorney for the commonwealth.

Wherefore the judgment is affirmed.

Breckenridge, Buckner, Huston, for appellant.

Attorney General, for appellee.

CUMBERLAND & OHIO RAILROAD CO. v. URIAH SHUMAKER.**Railroads—Subscription by County to Capital Stock—Mandamus.**

Where a proposition to subscribe to the capital stock of a railroad has been authorized by an act of the legislature and a majority voted in favor of the proposition, it is imperative on the county court to subscribe for the stock, and upon failure to do so mandamus is the proper remedy.

APPEAL FROM WASHINGTON CIRCUIT COURT.

October 9, 1871.

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OPINION BY JUDGE PETERS:

By the act of the Legislature incorporating appellant, the courts of the respective counties therein named are authorized to take stock in it, and issue bonds of the county in payment thereof after having submitted the question for making the subscription to the qualified voters of such county, and a majority shall have voted for said subscription. The act is imperative on the county court after the question has been submitted and a majority of the voters vote in favor of it. And if the facts requisite to the subscription are shown to exist, and the court should then refuse, a mandamus to compel the county court to make the subscriptions to the capital stock of appellant is the appropriate remedy. *Justices of Clark Co. v. Paris, Winchester and Kentucky River Turnpike Road Co.*, 11 Ben. Mon. 146.

The duty imposed on the county court by the legislative enactment aforesaid is merely ministerial, and this court has no jurisdiction to revise or reverse an order merely refusing to perform that duty. *Page v. Hardin*, 8 B. Mon. 651.

Wherefore the motion of appellee must be sustained and the appeal dismissed.

Thompson, Montague, for appellee.

SAMUELS, ARNOLD & Co. v. R. M. HENDERSON & Co.**Fraudulent Conveyance—Purchase by Husband—Title Bond to Wife—Stranger.**

The debtor is found in the possession of the land, and he contracted for the purchase of it, and, although by the recitals of the bond his wife holds the equitable title, the recitals are not evidence against a stranger to the transaction, while between the parties they might be evidence of the facts recited.

APPEAL FROM BALLARD CIRCUIT COURT.

December 20, 1871.

OPINION BY JUDGE PETERS:

At the conclusion of the prayer for relief; and at the end of a petition of more than five pages in length, the averment of

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which the relief sought could not have been granted, is found, out of place and where it was not to be looked for, it therefore escaped the attention of the court, and was not observed until after an opinion had been delivered and a petition for a rehearing was presented. But the allegation is made and is not controverted by the answers; it must, therefore, be taken as true. And the question arises, are the facts pleaded in the answer without evidence to sustain them sufficient to defeat a recovery? They are not, because it fails to controvert the fact that the debt of appellants was created before the bond was executed. And as R. M. Henderson, the debtor, is found in the ostensible possession of the land and he contracted for the purchase of it, and although by the *recitals of the bond*, Mrs. Henderson holds the equitable title; the recitals are not evidence against strangers to the transaction while as between the parties they might be evidence of the facts recited; that being the case, it was incumbent on appellees to prove that the land was paid for with her means, which was not done. Wherefore the judgment is reversed and the cause remanded for further proceedings consistent herewith. Appellees should have reasonable time allowed to make preparation by proof in the case if it is desired. Judge Lindsay not sitting in the case.

Bigger & Moss, for appellant.

Bullock, for appellee.

GARLAND SIMS v. WM. BENNET.**Bankruptcy—Discharge Bars Right of Recovery.**

The discharge in bankruptcy of Bennett barred Sims' right of recovery against him, and as Sims could not recover he could not subject property in the hands of the assignee.

APPEAL FROM MERCER CIRCUIT COURT.

December 21, 1871.

OPINION BY JUDGE LINDSAY:

Any equitable right which Sims may have had to subject the property of Bennet to the payment of Tatum's debt to him grew out of the fact that Bennet was his debtor, and Bennet the debtor of Tatum.

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The discharge in bankruptcy of the latter barred Sims' right of recovery against him, and as Sims could not recover against the party immediately indebted to him, neither could he subject to the payment of the bankrupt debts choses in action nor equitable rights the title to which by operation of law vested in his assignee. The petition was properly dismissed.

Judgment affirmed.

Kyle & Poston, for appellant.

Phil B. Thompson, Jr., for appellee.

MARTHA COOPER v. WM. COOPER'S HEIRS AND CREDITORS.

Army and Navy—Soldier—Arrears of Pay—Who Entitled.

The government having paid the arrears to the widow, it must be presumed that she brought herself within the provisions of the law, although the fact that the payment has been made to her may not be conclusive as to her right to retain the money as against her husband's creditors, it at least makes out a *prima facie* case in her favor.

APPEAL FROM MORGAN CIRCUIT COURT.

October 17, 1871.

OPINION BY JUDGE LINDSAY:

The intestate Wm. Cooper was, or had been, a lieutenant in the army of the United States, and at the time of his death there remained due and unpaid to him arrears of pay amounting to over one thousand dollars. These arrears were applied for and received from the Federal government by the appellant, who is his widow. She is also his administratrix. She prosecutes this appeal from a judgment of the Morgan circuit court, requiring her to account for the monies thus received as assets of the estate of her intestate.

The 6th section of an act of Congress, approved July 22, 1861, entitled "An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property," reads, "That any volunteer who may be received into the service of the United States under this act, and who may be

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wounded or otherwise disabled in the service shall be entitled to the benefits which may have been or may be conferred on persons disabled in the regular service; and the widow, if there be one, and if not, the legal heirs of such as die or may be killed in the service in addition to all arrears of pay and allowances, shall receive one hundred dollars."

The statement of agreed facts in the record does not show whether Cooper died while in the service or after his discharge, nor is it shown by any proof in the record. Upon this state of case an interlocutory judgment was entered by which it was decreed that the amount thus collected from the Federal government was assets in the hands of Mrs. Cooper, held by her as administratrix.

After this, on the 24th day of November, 1869, Joel W. Ervin and A. P. Cooper filed a joint answer which they made a cross-petition against appellant charging that Cooper did not die until after his discharge from the army. The relief sought by these defendants was in the nature of the assertion of a counter-claim, and as the proceeding was in equity, appellant had twenty days within which to reply. *Civil Code, Section 139.*

Three days after the filing of this answer and before its allegations could be taken for confessed, the cause was again submitted and the court rendered a second and final judgment fixing the liability of Mrs. Cooper to account for the monies in question as assets.

It is insisted that this judgment should be affirmed because under the act of Congress she was not entitled to the arrears of pay due her deceased husband, unless he was either killed or died in the service. The language of the statute seems to imply that the widow, if there be one, is to take all arrears of pay due the soldier at the time of his death in any event, and if he dies or is killed while in the service, then she shall, in addition thereto, receive one hundred dollars. Without however determining the proper construction of the statute, for it is not now necessary to do so.

The judgment appealed from must be reversed. The government having paid the arrears to Mrs. Cooper as widow, it must be presumed that she brought herself within the provisions of the law, and though the fact that the payment has been made

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to her may not be conclusive as to her right to retain the money as against her husband's creditors, it at least makes out a *prima facie* case in her favor, and those who are seeking to charge her with this money as assets must make out a case warranting the granting of such relief as they seek. No such case is made out by the pleadings and facts presented by the record before us.

Wherefore the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Hazelrigg & Apperson & Reid, for appellant.

Holt, for appellee.

MILO BAXTER, ETC., v. CURTIS M. FIELDER, ETC.

Fraudulent Conveyance—Heirs of Vendor Cannot Inherit.

Appellant proves that Wm. Fielder caused the land to be conveyed to Mrs. Coen to protect it from his creditors. Such being the case, she had a right to hold it as against him and his heirs; therefore, the appellant did not take any part of it by inheritance upon the death of his father.

FROM THE MADISON CIRCUIT COURT.

October 3, 1871.

OPINION BY JUDGE LINDSAY:

The evidence in this case shows that Curtis Fielder, the real debtor, never held the title to any portion of the tract of land for the purchase price of which the note of Elizabeth Tudor to his wife was given. Upon the contrary, the legal title to such land was in Mrs. Coen from the year 1856 up to the sale to Tudor. Appellants prove that Wm. Fielder caused the land to be conveyed to Mrs. Coen to protect it from his creditors. Such being the case, she had the right to hold it as against him and his heirs.

Therefore his son, Curtis Fielder, did not take any part of it by inheritance upon his father's death. As the land could not have been subjected to the payment of Curtis Fielder's debts, Mrs. Coen had the right to give one of the notes given for the

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purchase price thereof to his wife, and this note until it was reduced to the husband's possession could not be taken by his creditors. He died without having reduced it to possession. Wherefore appellant's petitions were properly dismissed. Judgment affirmed.

Turner, for appellants.

Burnam, for appellees.

VIOLA ALLEN, ETC., v. RANDLE & TYLER.

Bills and Notes—Assignment—Possession Prima Facie Evidence of Ownership—Burden of Proof.

Filing the evidence of a debt, a note, with the petition without the assignment of the payee therein by the plaintiff, he having the possession and making the averment that he was the owner, is prima facie evidence of his right to the debt, and puts the onus on the defendant, if he questions the right of the plaintiff, and the evidence of the debt being filed becomes a part of the record.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 13, 1871.

OPINION BY JUDGE PETERS:

The first objection taken to the chancellor's judgment is that, as the answer of the guardian *ad litem* put in issue the fact of assignment of the claims sued on to appellees, and there was no proof of that fact, the petition should have been dismissed.

The assignors of appellee were made defendants to the petition; the greater part of them answered and swore to their answers in person, admitting the assignments as alleged; that would certainly bar them in any action they might bring for the same cause against appellants.

Appellee produced and filed with their petition the notes not reduced to judgments, and proved the signatures thereto to be in the handwriting of decedent, and they also produced and filed therewith copies of the debts reduced to judgments with assignments thereon, and this court has held that the filing the evidence of a debt, a note, with the petition without the as-

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signment of the payee therein by the plaintiff, he having the possession and making the averment that he was the owner, is *prima facie* evidence of his right to the debt, and puts the onus on the defendant if his right is questioned by him, and the evidence of the debt being filed becomes part of the record. On that account, therefore, we see no objection to the judgment. In this view of the case it did not devolve on appellees to offer any other evidence; but if they had been required to do so, the answers of the defendants, their assignors, would have been wholly insufficient for such a purpose.

Section 142, *Civ. Co.*, provides that every pleading must be subscribed by the party filing the same, or his attorney, and the petition, answer and reply must be verified by the affidavit of the parties, etc. The answer of North and Scott is not signed by them, but the affidavit is signed by Lauderdale, who swears that they were both absent from the state, that he is their attorney and he believes the statements in the answer to be true. We see no reason why the signature of the party to the affidavit is not a sufficient signing and a compliance with the code *supra*. But if the verification were insufficient, or the answer not properly signed, it is too late after judgment to object. Section 165, *Civil Code*. But we understand these objections to be made because the court below regarded these answers as evidence of the respective assignments alleged to have been made by said defendants. But even if they were so regarded, the possession of the claims and filing them with the petition were sufficient *prima facie* until rebutted by evidence of appellants; these observations apply to all the answers in the same condition. As to the main question it is true the debts sued for have been outstanding for a considerable length of time; but as rebutting the presumption of payment arising from the lapse of time a number of the creditors of Allen had reduced their debts to judgment, and execution thereon had been officially returned, no property found, and within a few years after those returns were made Allen left the State of Kentucky. Matheny proves that he removed to Memphis, Tenn., in 1862, and from there he removed to New Albany, Indiana, where he resided up to his death, staying a part of the time in Portland, Kentucky, and died in August, 1867, and this suit was brought

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in September, 1868. Under these circumstances, and the condition of the country during the greater part of the time of his absence, which courts must judicially recognize, overcome the presumption of payment that otherwise might arise from the lapse of time. If Matheny had specifically stated how and where Allen got the money which he represented as his children's money, where the property was that was sold, and the amount, it would have been satisfactory; but although he is the uncle of the appellant, the brother of their mother, and must be presumed to have known the amount, or proximate amount of estate they derived from that source, if any, he evidently bases his conclusion that the money paid for the property was the money of appellants on the statements of their father, and does not attempt to explain such facts as are necessary to establish their claim to the property when other facts proved are considered; the insolvency of their father, his statements to some of the witnesses that he had money, but he did not intend that his creditors should get any of it, and his statement to Arnold that he desired the deed made to him for life remainder to his children to prevent his wife from deriving any benefit from the property, not then pretending that the money was appellant's. Nor do we think that the mere fact that Landrum and Brother took two notes from Allen some years after they had recovered a judgment against him sufficient evidence of itself that he had satisfied the judgment, although no execution seems to have been sued out by them. If they had been in satisfaction in part, or in whole of said judgment, it is presumable that the fact would have been expressed in the notes.

We can not, from all the facts developed in this record, conclude that the court below erred.

Wherefore the judgment is affirmed.

Cladwell, Gibson, for appellant.

Beattie, for appellee.

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J. B. & JESSE BRYANT v. W. K. ESKRIDGE, ETC.

Wills—Devise to a Class—Survivorship.

"I give to Mildred Brusaugh the plantation on which we now reside, until the youngest child she has had by me may arrive at twenty-one years of age, for the purpose of raising said children, and when the youngest becomes of age I then wish them to sell my land and divide the money equally between them, and I appoint Mildred Brusaugh my executrix."

Mildred Brusaugh qualified as executrix and undertook to execute the will of the testator.

Four of the devisees died intestate before the youngest arrived at age, leaving three survivors, one of whom, together with the executrix, conveyed the land to appellants.

Held, that it was the intention of the testator that the persons described as his children by Mildred Brusaugh should take the estate as a class—they were not to come into the separate enjoyment of it until the youngest arrived at the age of twenty-one years. Until that period it was to be left for the support of the beneficiaries, and if either or even all of them except the youngest one had died before she attained the age of twenty-one years, still the executrix was to retain the estate to raise that child.

The estate was intended by the testator to pass to the survivors in case of the death of any of them before that time without issue; therefore appellant took nothing under the deed except the interest of one of the devisees.

APPEAL FROM HARRISON CIRCUIT COURT.

September 7, 1871.

OPINION BY JUDGE PETERS:

William K. Eskridge, Sr., died in July, 1852, having first made and published his last will, which was probated by the proper court, and by which he disposed of his estate in the following language: "I give, devise and bequeath to Mildred Brusaugh the plantation on which we now reside, containing one hundred and thirty-two acres on the waters of Raven creek, Harrison county, Kentucky, until the youngest child, which she has had by me, may arrive at twenty-one years of age, for the purpose of raising the several little children, which she has had by me since we have been living together, and also to enable her to pay what little I am owing, which is not much, and also for the purpose of raising and educating my *several* little chil-

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dren which she has had by me, namely, George Washington Eskridge, Francis Elner Eskridge, Rebecca Harris Eskridge, Thomas Jefferson Eskridge, Willis Foley Eskridge; and when the youngest (I. E.) becomes of age, I then wish them to sell my land and divide the money equally between them, my seven above named children, after paying to my son Robert Pope Eskridge's little daughter, Henrietta Jane Eskridge, one hundred dollars, and also to my son James Johnston Eskridge one hundred dollars, which two is to be paid after the farm is sold, and not before"—and concluded by revoking all wills before made by him, and appointing Mildred Brusaugh and his son, George Washington Brusaugh, his executrix and executor.

In September, 1867, William K. Eskridge and Salinda Eskridge, infants, suing by their next friend, brought this suit, alleging after setting out said will in their petition that since the death of the testator four of the persons named as his children and devisees and the granddaughter had died intestate, and without issue—leaving as their heirs-at-law the surviving brothers and sisters, viz.: Geo. W. Eskridge, Wm. K. Eskridge and Salinda A. Eskridge, who take the estate devised. That Mildred Brusaugh qualified as executrix and undertook to execute the will of said testator—and that she, by her deed dated 7th of February, 1866, conveyed to J. B. and Jesse Bryant the land devised by the testator, and had given possession of the whole tract to them except the house and garden, containing about one acre, and reserving pasture for a horse and cow, and part of the fruit of the orchard till the 25th of December, at which time she has covenanted to give full possession—that they, the said Wm. K. and Salinda, were then under 21 years of age, the younger of whom would not arrive at full age till the — day of April, 1870; that the land reserved is not sufficient for their support and education, that no other provision had been made to support and educate them, and that they were destitute of means. That the purchasers are the brothers of the said Mildred, that the price agreed to be paid was only \$300 when the land was and is worth \$20 per acre. They charge that said deed was made to defraud them of their rights, and in violation of the provisions of the will—and pray that it be set aside and for general relief.

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The deed of Mildred Brusaugh is made part of the petition and purports to convey to the vendees all the right to the land which she may have acquired by the death of the four devisees, and all the interest she may otherwise have in said estate.

Appellants, in their answer, claim that the portion of the child who first died descended to its brothers and sisters in equal portions, and that the portions of the other children who died descended to the mother, brothers and sisters surviving in equal portions, and that the several shares of the estate which Mildred Brusaugh thus acquired passed by her deed to them, and that all the interest in the estate which George W. Eskridge took under the will, and also all that he acquired by descent from his deceased brothers and sisters, passed by his deed to them, which is exhibited in the suit.

On the trial of the cause the court below adjudged that Mildred Brusaugh inherited nothing from the deceased children, and her deed to the Bryants, therefore, passed nothing, but that whatever interest Geo. W. Eskridge had in the estate at the time passed by his deed to his vendees, the Bryants—but that Mildred Brusaugh was constituted by the will trustee for the devisees to hold the land till the youngest child should become of age, and for the purpose of executing the trust the court adjudged that the land in possession of the Bryants should be surrendered to her, and referred the cause to the master to settle the account for rents, amelioration by improvements and interest, etc.—and from that judgment, and the judgment adjusting the account between the parties, the Bryants have appealed.

Novel and interesting questions are presented and ably discussed by the learned counsel representing the parties to this appeal, which certainly are not devoid of difficulty, but which we do not deem necessary to be decided in this controversy. From the context of the will, and the situation of the parties as developed by the record, we can not doubt that it was the intention of the testator that persons described as his children by Mildred Brusaugh should take the estate as a class—they were not to come into the separate enjoyment of it until the youngest arrived at the age of 21 years. Until that period it was to be left for the support and education of these beneficiaries, and if either or even if all of them except the youngest one had died

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before she attained the age of 21 years, still the executrix was to retain the estate to pay the testator's debts and to raise and educate that child. No other disposition was made of it during her minority, and so we conclude that the estate was intended by the testator to pass to the persons named when the period fixed by him for distributing it arrived, if they were living, and in case of the death of any of them before that time without issue, then to their survivors.

That being our view of the case we concur with the circuit judge that appellants took nothing under the deed of Mildred Brusaugh, and that they took whatever interest George W. Eskridge had by his conveyance to them at its date. But that the land must be sold and they must take it in money. They have no right to have the land divided and the portion set apart to them; that would be a violation of the will of testator and might seriously injure the other parties interested.

No error prejudicial to appellants is perceived in the judgment of the 19th of May, 1869, nor in the subsequent one adjusting the accounts between the parties.

Wherefore both judgments are affirmed.

JAMES BUTTS v. DAVID S. HAZELRIGG, ETC.

Vendor and Purchaser—Conditions Precedent—When Cause of Action Accrues for Purchase Money—Interest—Cost.

By the terms of the writing evidencing the sale to appellant, the purchase money was not due appellee until he performed the conditions precedent of having the land run out and a sufficient deed made, and interest on the deferred payment did not begin to run until that was done.

Same—Cost.

When the suit was brought appellee had not made and tendered appellant a sufficient deed. The money was not due until that was done, nor had he until then any cause of action, and therefore not entitled to cost.

APPEAL FROM BATH CIRCUIT COURT.

October 11, 1871.

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OPINION BY JUDGE PETERS:

For the fatal errors herein set forth the judgment complained of must be reversed.

First—By the terms of the writing evidencing the sale to appellants he, in payment for the land, was to assign a note on J. H. Roberts to appellee for \$2,805, due 17th of March, 1866, which had been assigned to him by W. R. Maupin, and after deducting the amount of said note and interest the balance to make up the price of the land, \$333.33. Butts was to pay in money after deducting \$55 price of a cow, “all to be done as soon as the land is run out and the deed *made to Butts.*” From this language it is most evident that the money was not due, and appellee had no right to demand it until he performed the conditions precedent of having the land run out, the deed made and tendered was adjudged insufficient, the conveyance by sufficient deed was not made till the 23d of March, 1871, and interest on the purchase money should have been computed only from that date instead of from the 16th of March, 1866, as was erroneously fixed by the judgment.

Nor can appellee complain of that, for from all that appears in the record he could as easily have made the deed within one month from the day of the contract on the 22d of January, 1867, as when it was made. And if he had done so appellant, as appears from the evidence, could have effected a sale to Maupin at an advance on his purchase of \$666.66; of this profit he was deprived by the delay of appellee in making the deed.

Second—Appellant charges in a cross-petition that appellee owed him \$24 for rent on the land—which appellee admits in an answer to said cross-petition he did owe, but the judgment fails to credit appellant with that sum, which should have been done of date the first day of January, 1868, but no interest to be computed on it.

And *last*—When this suit was brought in 1868, appellee had not made and tendered to appellant a sufficient deed for the land; the one he tendered was adjudged insufficient, the money, as we have already seen, was not due till that was done, nor had he till then any cause of action—and it was therefore erroneous to adjudge any costs against appellant which had accrued in

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this suit until the 23d of March, 1871, when a sufficient deed was tendered—but up to that period he was entitled to his costs.

For these errors the judgment must be *reversed* and the cause remanded with directions to enter a judgment and for further proceedings consistent herewith for all subsequent costs after the tender of the deed of the 23d of March, 1871—appellant is liable—and if he fails to pay the amount found to be due as herein indicated, appellee's lien on the land should be enforced.

Nesbitt, for appellant.

Reid & Hazelrigg, for appellee.

J. C. BAIRD *v.* TIMOTHY CLANEY.

Bills and Notes—Inland Bill—Protest—Notice to Drawer—Action—Necessary Averments.

If appellant had intended to hold the drawer of the bill responsible for the amount on the grounds of want of funds in the hands of the drawee, the fact must have been averred in the petition, and, further, that the appellee had notice of the protest.

APPEAL FROM BATH CIRCUIT COURT.

October 9, 1871.

OPINION BY JUDGE PETERS:

The instrument sued on is an inland bill of exchange and in order to charge the drawer it must in due time have been presented for acceptance, and if it was protested it was the duty of the holder to have notified the drawer thereof with proper diligence of the protest. *Strader v. Bachelor*, 8 B. Mon. 169. And if appellant had intended to hold the drawer of the bill responsible for the amount on the ground of want of funds in the hands of the drawee, the fact must have been averred in the petition. *Frazier v. Harvie*, 2 Lit. 180. In this case it is neither averred in the petition that appellee had due notice of the protest, nor is it averred that he had no funds in the hands of the drawee, when the bill was drawn—and having failed to state

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a cause of action the court below did not err in the instruction complained of. Judgment *affirmed*.

Lacy, for appellant.

Stone & Turner, for appellee.

HENRY WARD *v.* R. G. SAMUELS, ETC., AND HENRY WARD *v.* A. W. DUDLEY, ETC.

Judicial Sales—Pleading—Proper Allegation Must Appear in Petition.

It is not alleged that the note sued on was given as part of the price of the land, nor is it alleged that the payees in the note had or were able to convey the title, even if it had been alleged that there was a lien on the land to secure the debt, and there is not an allegation in any of the pleadings in the suit with which this one is consolidated authorizing the judgment.

APPEALS FROM McLEAN CIRCUIT COURT.

March 12, 1872.

OPINION BY JUDGE PETERS:

There are two appeals upon this record, in the one of Ward against Samuels, etc., the last and only final order made is in these words:

The parties appeared by their attorneys, and on motion this cause is stricken from the docket. The only rational or legitimate interpretation that we can give this order is that the cause was stricken from the docket, on motion of the attorneys for the parties, which must be a consent order, and having been so entered, appellant can not now avail himself of any error that may have been committed in the progress of the case to reverse a judgment which he himself consented to have entered. That judgment must therefore be affirmed.

As to the case of Ward against Dudley, etc., it is in quite a different condition; there are no allegations in the petition which authorizes a judgment to sell land. It is not alleged that the note sued on was given a part of the price of the land, nor is it alleged the payees in the note had or were able to con—

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vey the title even if it had been alleged that there was a lien on land to secure the debt, and there is not an allegation in any of the pleadings in the suit of *Ward v. Samuels, etc.*, with which it was consolidated to authorize the judgment so that in any view of the case the judgment for a sale of land was wholly unauthorized. Wherefore the judgment for the sale of the land is reversed and the cause is remanded for further proceedings. If the parties should offer on the return of the cause to amend their pleadings, permission should be to do so.

Johnson, for appellants.

James, for appellees.

ADAH R. ADDISON v. HESS Y. ADDISON.

Divorce—Grounds for—Five Years' Separation.

Five years' separation without cohabitation and the failure of the husband in that time to provide or attempt to provide a home for his family leave no doubt that he has, at any time since the separation, in good faith contemplated the resumption of his marital relations with his wife.

Held, that these facts make out a statutory ground of divorce.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 21, 1871.

OPINION BY JUDGE LINDSAY:

The supplemental petition of appellant, filed on the first day of October, 1870, substantially alleges that she and her husband had lived separate and apart for five consecutive years next preceding that date without cohabitation. The last two with the intention of abandonment. To this petition appellee entered his appearance by filing an answer.

The proof conclusively establishes the five years' separation, and all the circumstances proven in the case tend to show that there had been no cohabitation between the parties during that time.

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The positive refusal of appellant in 1868, when appellee was in Louisville, to permit him to hold any intercourse with her except in the presence of third parties, and then only for the purpose of allowing him to see his children, sufficiently indicates that she had then determined never to live with him again. This presumption is not rebutted by the character of the letters she subsequently wrote him. These letters refer almost exclusively to their children, and there is nothing in any of them calculated to lead to the conclusion that she was looking forward to a time when she would again go back to her husband to live. The carefully studied expressions of tenderness in these letters are only such as would naturally be used by a woman of elevated sentiments, as appellant appears to be in addressing a man whom she had once recognized as her husband and who was the father of her children.

The failure of appellee for five years to provide, or so far as the record shows to attempt to provide a home for his family, the fact that he has attempted upon but one occasion to see his wife during that time, and the utterly heartless and brutal manner in which he has conducted the defense in this case leaves no doubt upon one's mind that he has at no time since the separation contemplated in good faith the resumption of his marital relations with his wife.

We are of opinion that the proof in the record makes out a statutory ground for a divorce from the bonds of matrimony, and that the chancellor erred in not giving the *appellee* this relief. The judgment is affirmed so far as it gives to Mrs. Addison the custody of her children, but reversed in so far as it refuses to give a divorce *a vinculo matrimonii*.

The case is remanded for further proceedings consistent with this opinion.

Fleming, for appellant.

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WM. BONAR v. JAS. G. ARNOLD.

New Trial—Newly Discovered Evidence Contradictory of Proof on First Trial.

The appellant proved on the first trial that Ambler, in payment for the hogs sold him, was to lift the note due to appellee. By the newly discovered testimony he seeks to establish the fact that he received the hogs in payment of the note, and that under his authority as agent he had the right to do so.

Held, that the most liberal practice will not authorize a new trial to enable the applicant to contradict what he has proven on the first trial.

APPEAL FROM PENDLETON CIRCUIT COURT.

September 20, 1871.

OPINION BY JUDGE LINDSAY:

The petition for a rehearing in this case is based upon the alleged ground of newly discovered testimony tending to show that Ambler, the agent of appellee, had the authority to receive in payment of the notes in his hands for collection stock, produce, etc.

It does not appear that appellant had made any effort whatever, prior to the rendition of the judgment sought to be vacated, to ascertain or to prove the nature and extent of Ambler's authority. Nor that the information he subsequently acquired upon this subject was volunteered to him by the witnesses, but rather sought them out after defeat, and then for the first time enquired as to what he could prove by them. No explanation is given as to why he hunted these witnesses up after judgment, and failed to do so before. To grant him a new trial under such circumstances would be to encourage negligence upon the part of suitors, in effect to authorize them to speculate upon the action of the court, with an implied assurance that they would be allowed to prepare their case for trial after judgment in case the result was unfavorable. In addition to this, the new testimony is calculated to contradict the evidence produced by appellant upon the first trial.

He then proved that Ambler in payment for the hogs sold him was to lift the note due to appellee. He now seeks to establish that he received the hogs in payment of the note, and that, under his authority as agent, he had the right to do so.

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The most liberal practice will not authorize a new trial to enable the applicant to contradict what he proved upon the first trials. We are of opinion that his petition was properly dismissed.

Judgment affirmed.

Ireland, for appellant.

Foote, for appellee.

L. P. CONVERSE *v.* COMMONWEALTH.

Criminal Law—Obtaining Property by False Pretense—Indictment.

The indictment in this case clearly charges that the defendant willfully and knowingly misrepresented the number and quality of the watches and chains contained in the box, and the genuineness of the note on Goodwin.

Held, that by said misrepresentation as to the value of the property delivered he deceived Elrod as to his ability to repay the loaned money; hence the offense was sufficiently charged.

APPEAL FROM JEFFERSON CIRCUIT COURT.

June 23, 1871.

OPINION BY JUDGE LINDSAY:

The indictment in this case charges that Converse, by delivering to John C. Elrod a box which he, the said Converse, falsely, fraudulently and feloniously represented and pretended contained six gold watches and chains, and by delivering to said Elrod a paper purporting to be a note for over six hundred dollars on one Goodwin, and by falsely, fraudulently and feloniously representing that said note was genuine, and that Goodwin did business at No. 220 East Randolph street, in the city of Chicago, and that he was solvent and good, did obtain from Elrod money, notes and national bank bills to the amount of four hundred and seventy-five dollars, which amount of money Elrod was induced to part with by reason of his believing and relying upon the aforesaid representations of Converse, all of which were untrue, and so known to be to Converse at the time they were

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made. The box delivered contained but four watches and three chains instead of six of each, and the same not being gold as represented, and the note on Goodwin, not being genuine, but a forgery, which false, fraudulent and felonious representations it is charged were made by Converse for the purpose and with the intent of defrauding the said Elrod. Upon a trial the appellant was convicted. He here asserts that his motion in arrest of judgment should have been sustained, because of the fact that the indictment does not charge that by the delivery of the box of watches and chains, or of the note on Goodwin, it was intended that Elrod should take any interest in either of them. That it is not charged that Converse sold the same to Elrod, or that he pledged them to him as a security for the money obtained, and hence that his representations concerning the contents of the box, and the genuineness of the note, however false they may have been, were not sufficient to constitute the offense of obtaining money or property by a "false pretense or token." This objection would be available if it were necessary to make the offense contemplated by the statute complete, that the party defrauded should take an interest, or be induced to believe that he was acquiring an interest in the property concerning which the false and fraudulent representations may have been made. In our opinion the statute does not admit of such construction.

Wharton says: "The rule may be broadly stated that any designed misrepresentation of the defendant's means, by which he obtains the goods of another, is within the statute. (*Amer. Crim. Law*, 720).

Any wilful misrepresentation concerning the party's means, or estate, calculated to give him credit, and by which he is enabled to impose upon a person of ordinary caution is likewise within the statute.

Where the accused falsely represented that he had a capital of two thousand dollars, and by that means obtained the property of the prosecutor, it was held to be within the act. *Comlth. v. Poulson*, 6th Penn. Law Journal 272. And so where a minor fraudulently obtained goods, by falsely representing himself to be a joint owner with his father of a number of cows and other stock on a neighboring farm. *People v. Kendall*, 25th Wendell 399.

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The indictment in this case clearly charges that the defendant wilfully and knowingly misrepresented the number and quality of the watches and chains in the box, and the genuineness of the note on Goodwin, and by said misrepresentations as to the value of the property delivered he deceived Elrod as to his ability to repay the loaned money, and by and through this deception induced the latter to make the loan. Hence we conclude that the offense was sufficiently charged, and that the motion in arrest of judgment was properly overruled.

The instructions given at the instance of the commonwealth attorney are as favorable to the appellant as the law and facts of the case would admit. The instruction asked for by the appellant and modified by the court is not copied into the bill of exceptions, consequently we can not determine as to the propriety of the court's action. The objection that the verdict of the jury is contrary to the evidence can not be considered by this court, as we have no power to reverse on this ground.

Judgment affirmed.

Bramlette, Durrett, for appellant.

Attorney General, for appellee.

JOHN ABBOTT v. MARY LEWIS.

Breach of Marriage Promise—Excessive Damages—Passion or Prejudice of Jury—Remittitur Damnum.

The amount of damages assessed clearly indicates that the jury must have acted under the influence of passion or prejudice. Such fact was recognized by the appellee, and upon the suggestion of the court, consented that a judgment should be entered for two-fifths of the damages assessed.

Held, that when it appears that the jury were influenced by passion or prejudice in the assessment of damages, it may readily be concluded that the same cause influenced them in determining whether or not the appellee was entitled to recover at all.

APPEAL FROM CAMPBELL CIRCUIT COURT.

June 14, 1871.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

Avoiding any expression of opinion as to the preponderance of the evidence presented by the record, we are satisfied that the same does not preponderate upon either side to such an extent as would warrant the interference of this court upon that ground alone, had the jury returned a reasonable verdict for the appellee, or had they found for the appellant.

Considering all the testimony and bearing in mind the circumstances attending the refusal of appellant to perform his agreement to marry the appellee (if in point of fact any such agreement ever existed) we are forced to the conclusion that the damages assessed, \$5,000, are so excessive as to clearly indicate that the jury must have acted under the influence of passion or prejudice.

Such fact was recognized by the appellee herself, and without being put upon terms, she voluntarily proposed to remit two-fifths of the amount of the verdict, and upon the suggestion of the court, and without then being required to do so, consented that judgment should be entered for two-fifths of the damages assessed.

If thus appearing that the jury were influenced by passion or prejudice in the assessment of damages, it may readily be concluded that the same cause influenced them in determining whether or not the appellee was entitled to recover at all.

We are of opinion that the court erred in overruling the motion of the appellant for a new trial, and feel assured that the ends of justice will be promoted by a retrial of the cause.

Wherefore the judgment is reversed and the cause remanded for a new trial.

Ducker, Baker, for appellant.

THOMAS A. P. CHAMPLIN v. BETZ AND SCHRAEFFENBERGER.

Pleading Counter-Claim—What Constitutes—Answer Alleging Payment.

An answer setting forth facts sufficient to constitute a counter-claim must be so regarded, although it is not denominated as such.

A counter-claim must be a cause of action arising out of the transaction set forth in the petition or connected with the subject of the action. An answer alleging payment, merely, presents no cause of action.

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Evidence—When Writing May Be Offered.

When a writing purporting to have been executed by one of the parties is referred to and filed with a pleading, it may be read as genuine unless its genuineness is denied by affidavit before trial.

Evidence—Account Filed—Memorandum.

A memorandum in writing or an account filed as an exhibit and referred to in the pleadings cannot be read as evidence on the trial.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 7, 1871.

OPINION BY JUDGE PRYOR:

The appellees instituted this action in the mayor's court of Newport against the appellant to recover the sum of \$70.60, the balance alleged to be due for horse and buggy hire. A judgment was rendered in that court against the appellant, and an appeal taken to the circuit court of the county. In the circuit court a judgment was rendered against appellant for the amount claimed, and the case is now before this court on appeal. The evidence introduced by the appellees sustained this claim, and the only questions presented in the record are, first, upon the refusal of the court at the instance of the appellant to instruct the jury to find for him the amount claimed in his answer so far as it exceeds the demand of the appellees, and, secondly, did the court err in excluding from the jury as evidence the account filed by appellant with his answer and offered by him to be read on the trial. There was no evidence offered by the appellant on trial, except this account, in support of his defense, and the instruction was based upon the idea that the answer was a counterclaim, and appellees having failed to respond to it, the allegations are to be taken as true. The answer, after admitting certain portions of appellees' demand, alleges that appellant had advanced to the appellees at various times the sums of \$20.00, \$30.00 and \$40.00, and that the two first items could be seen by reference to the credits given him on the account filed with the petition. In the absence of any allegations to the contrary, the only presumption to be indulged in is that these several sums of money were payments on his indebtedness to appellees, and

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the answer is only a plea of payment and not a counter-claim. An answer setting forth facts sufficient to constitute a counter-claim must be so regarded, although it is not denominated as such. A counter-claim must be a cause of action arising out of the transaction set forth in the petition, or connected with the subject of the action. *Tinsley v. Tinsley, etc.*, 15 B. Monroe 460. An answer alleging payment merely presents no cause of action. The court properly refused to permit the account filed with defendant's answer to be read to the jury. There was no proof that it was rendered by appellees or in their handwriting. Section 588, *Code of Practice*, reads as follows: "When a writing purporting to have been executed by one of the parties is referred to, and filed with a pleading, it may be read as genuine unless its genuineness is denied by affidavit before the trial is begun." This section applies to writings executed, that is signed or purporting to have been signed by the party against whom it is offered to be read. (*Breden v. Betteson, M. S. Opinion, January, 1853.* A memorandum in writing with no signature affixed to it, or an account filed as an exhibit and referred to it in the pleadings, although alleged to have been rendered by the party sought to be charged, is not embraced by this section of the code. Such writings can not be read except in cases where the party against whom they are pleaded is required to respond and fails to do so. The judgment of the court below is affirmed with damages.

Holland, for appellant.

WM. WHITE, ETC., v. JAS. DUNN, ETC.

Executors and Administrators—Settlement—Former Administrators Should Surrender Assets—Sureties on Bond Not Liable to Administrator de Bonis Non But to Heirs and Creditors.

In a suit by an administrator de bonis non against a former administrator the court should compel him to surrender all the choses in action and chattels belonging to the estate in order that the former could enforce payment or make the latter liable for their value, but the sureties cannot be held liable to the administrator de bonis non, while they would be to the heirs and creditors.

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APPEAL FROM BALLARD CIRCUIT COURT.

March 1, 1872.

OPINION BY JUDGE PETERS:

This equitable suit was brought by appellants as administrators *de bonis non* against Dunn, etc., the removed administrators of one Hammond's deceased, and in their petition it is alleged that the former administrators made a partial settlement of their fiducial accounts in which they reported a note on Wiley Taylor for \$1,600 and other notes and accounts of smaller amounts on other persons, all of which were part of the estate of said decedent and were uncollected by them, and claimed a credit therefor. But that they failed to file said notes and evidence of debts as aforesaid, and that plaintiffs as administrators *de bonis non* were unable to reduce said notes, etc., to their possession so that they could enforce payment of the debtors, and they pray that said appellees be compelled to surrender the same to them, or to account for the amount.

To this petition a demurrer was filed by appellee Dunn and his demurrer sustained, and the plaintiffs below have brought the case to this court.

Certainly these choses in action, according to the allegations of the petition, were chattels of the intestate unadministered, and may have been assets in the hands of the administrators *de bonis non*, and that by the demurrer is admitted.

The former administrators had not made said debts their own by charging themselves with the amount thereof—and in said settlement of their accounts as administrators as aforesaid, they had claimed credits for them because they were unadministered—and according to the doctrine settled by this court, in *Saffran's Administrator v. Kennedy*, 7 J. J. Mar. 188; *Williams et al. v. Collins et al.*, 1 Ben. Mon. 58, and in the more recent case of *Burnes, etc., v. Roulac's Administrator*, 2 Bush 39; *Marryman v. Trunnell*, 3 Met. 147; appellants might prosecute this suit in equity against the former administrators to make them surrender said claims or to make them liable for their respective amounts, and the administrators were responsible, but the sureties are not re-

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sponsible to the administrators *de bonis non*, while they would be to his heirs and creditors.

Wherefore the judgment is reversed and the cause remanded with directions to overrule the demurrer, and to permit the amended petition to be filed and for further proceedings consistent herewith.

W. G. Bullitt, for appellants.

E. J. Bullitt, for appellees.

COMMONWEALTH FOR THE USE, ETC., v. JAMES MCCARROLL, ETC.

Executions—Failure to Levy—Sheriff's Responsibility.

It must appear by proof that the sheriff had knowledge of property owned by the defendant subject to the execution and on which he could make the levy, or a knowledge of such facts as should cause him to make exertions to find property, before he can be held liable to the plaintiff for failure to levy.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

November 10, 1871.

OPINION BY JUDGE PRYOR:

We perceive no available objection to the instructions given by the court below in this case—as decided by this court in the case of *Bell v. Commonwealth*, 1 J. J. Mar. 553. "It must appear by proof that the sheriff had knowledge of property owned by the defendant subject to the execution, and on which he could make the levy or a knowledge of such facts as should cause him to make exertions to find property." It seems from the evidence in this case that the defendant in the execution was the owner of but little, if any, property, and, although living on a farm where he at times had the control over and possession of some horses, mules, etc., and upon which a crop of tobacco was raised, still there were other persons living on the same farm, and who asserted an ownership of this property and used it in conjunction with the defendant in the execution. The appellant had sold to Sims, his debtor, this farm, and was compelled to take it

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back by reason of his inability to pay for it. The fact that others claimed this personal property, upon which appellant insists that the sheriff should have levied the execution, seems to have been known in the neighborhood, and this doubtless induced the sheriff not to make the levy. The instruction given by the court was as favorable to the appellant as it should have been, and in substance made the sheriff liable for failing to levy on this property in the event it belonged to the defendant in the execution, although others living on the same farm were at the time asserting claim to it. The evidence is conflicting upon the question as to who of these parties owned the property, and in such a case this court will not interfere with the verdict of a jury.

Wherefore the judgment of the court below is affirmed.

Petree & Faulconer, McPherson & Champlin, for appellant.

Phelps & Son, for appellee.

CHAS. BROWN & Co. v. W. J. ARNOLD & Co.

Pleadings—Exhibits Filed With Petition Must Control on Demurrer.

Where the right to property is based on written memoranda filed and made a part of the petition, these exhibits must be considered on demurrer and must control any statement in the pleading inconsistent with their terms and legal effect.

Husband and Wife—Wife's Separate Estate—How Created.

Property given to a wife before her marriage, without restriction or limitation, cannot, after marriage, be converted, by the donor, into her separate estate, to the prejudice of her husband's creditors.

APPEAL FROM FAYETTE CIRCUIT COURT.

September 29, 1871.

OPINION BY JUDGE LINDSAY:

The demurrer of the petition of Mrs. Arnold should have been sustained. She bases her right to the property in contest upon the written memoranda filed with and made part of her petition. These exhibits must be considered on demurrer, and

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must control any statements in the pleadings inconsistent with their terms and legal effect. The writing executed on the 18th of October, 1869, was a mere surrender by C. T. Connover to Mrs. Arnold, who was then unmarried, of the personal property bought by Connover from Schooly and wife.

The paper executed on the 24th of January, 1870, after the marriage of Mrs. Arnold, recites the fact that Connover gave said property to his daughter for her support, separate use and control; that such limitation was merely verbal, and that he was executing that paper for the purpose of them reducing it to writing. But when we come to examine the granting clause of this paper it is entirely consistent with the first memorandum. Connover states that in furtherance of his original intention he gave to his daughter Rebecca Arnold all the stock of confectionery, etc., purchased by James P. Schooly and wife, and authorized her to appoint her husband her agent to manage the same. There is no language used clearly expressing an intention to exclude the husband. Nor is there any distinction in respect to the enjoyment of the estate incompatible with his right to control it. The wife is to make him her agent with power to sell and reinvest, and whilst it is provided that the proceeds and profits are to remain the property of Mrs. Arnold for her support and use and under her absolute control, she is empowered out of the same to allow her husband compensation for his services. The two writings construed together lead our minds to the conclusion that Mrs. Arnold, prior to her marriage, held the property in question as general estate. That it vested in the husband upon their marriage.

That the second paper was intended to protect the property against Arnold's creditors, and that the husband was still to retain the right to use and enjoy it, and under the guise of compensation for services as agent to appropriate the principal and the profits as he might deem proper. Considering the facts presented by the petition and exhibits of the appellee, it is clear that her claim to the attached property rests solely upon an attempt upon the part of herself, her husband and father, after her marriage, to convert into a separate estate property which before marriage she held without limitation or restriction.

For these reasons the judgment is reversed and the cause

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remanded with instructions to sustain the demurrer to Mrs. Arnold's petition, and for other proper proceedings not inconsistent with this opinion.

Gibbons, for appellant.

Breckenridge & Buckner, for appellee.

CALISTERS ABELL *v.* GEORGE W. SCOTT.

Principal and Surety—Separate Obligation—Answer Must Show Relation—Statute of Limitation.

One may become surety for another by an obligation separate and distinct from the one executed by the principal, but this is not made to appear either by the note itself or the allegations of the answer. The answer must contain such allegations as will enable the court to determine that the relation of principal and surety exists by showing the liability of the party alleged to be the principal in the debt, before a plea of limitation will avail.

APPEAL FROM MARION CIRCUIT COURT.

October 17, 1871.

OPINION BY JUDGE PRYOR:

The appellants Green Forest and Calisters Abell, together with W. B. Beauchamp, executed to George W. Scott the following note: "One day after date we promise to pay George W. Scott three hundred and forty-one dollars and sixty-three cents, which we owe him jointly as security for William B. Abell, May 2, 1859.

(Signed) GREEN FOREST.
CALISTER ABELL.
W. B. BEAUCHAMP, Secy.

Scott, the appellee, instituted this suit on this note against the three obligors, and the appellants Forest and Abell filed their answer alleging in substance that William B. Abell was the principal debtor to plaintiff for the debt sued on, and that these defendants were mere sureties on the note and executed it for no other consideration and executed it only as sureties, and that seven years had elapsed. W. B. Beauchamp also

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answered alleging that he was only surety as appeared from the note itself, and relies upon the statute of limitations. The suit was dismissed as to Beauchamp and a demurrer filed by the appellee to the answer to Forest and Abell. This demurrer was sustained by the court below, and the defendant failing to plead further a judgment was rendered for the appellee for the debt and interest, and from this judgment the appellant has appealed. The demurrer was properly sustained. The note itself shows that William Abell is not liable upon it, nor does it appear from any allegations in the answer that the appellee Scott holds obligations for this money, and in the absence of such an allegation the presumption is that the original indebtedness was discharged by taking the individual obligation of the appellants for the debt and this presumption arising from the note itself. It is true that one may become the surety of another by an obligation separate and distinct from the one executed by the principal, but this is not made to appear either by the note itself or the allegations of the answer. The note shows that William Abell is not liable upon it, nor is there any allegation in the answer showing in what manner he is liable as principal for this debt. If William Abell's name was on the note his liability would appear, and an answer that his co-obligors are only sureties would be sufficient.

In a case like this the answer must contain such allegations as will enable the court to determine that the relation of principal and surety exists, by showing a liability on the part of the party alleged to be the principal in the debt. It will not do to allege in the answer merely that the defendants are sureties, when the obligation sued on creates no liability upon the party they allege to be the principal, and when his name even is not signed to the note. The facts showing how his liability as principal exists must be plead. Beauchamp was an obligor with the appellant in the note; his name is signed, "W. B. Beauchamp, Secy." Now, is Beauchamp the surety of the appellants in this note, or is he surety of William Abell? The note shows that he is the surety of the appellants, and that their liability is a direct and not a collateral undertaking.

The judgment is affirmed.

Harrison, for appellant.

Lindsay, for appellee.

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JULIA G. BURTON *v.* SARAH ANN BURTON.

Husband and Wife—Sale of Wife's Real Estate for Reinvestment—Deed to Husband—Wife to Become Owner Upon Death of Husband—Court of Equity Will Enforce Agreement.

The appellant at the time of her marriage was the owner of real estate inherited from her father. After marriage her husband induced her to sell her land for reinvestment. The proceeds were invested in other land, to which the husband took title under an agreement that if he died first he would arrange by will or otherwise that she should become the owner of the land. The husband died suddenly without securing the property to the wife.

Held, that if the husband was living the chancellor would not permit him to hold the property without securing the wife, and as his death prevented him from executing the agreement there is no reason why it should not be enforced now.

APPEAL FROM MASON CIRCUIT COURT.

October 24, 1871.

OPINION BY JUDGE PRYOR:

The appellant at the time of her marriage with J. W. Burton was the owner of considerable real estate in the county of Mason, inherited by her from her father. After her marriage, herself and husband lived upon her land, but the husband desiring to change his location induced the appellant to consent to a sale, and invest the proceeds in other real estate. It seems that the husband expressed a wish to have the land purchased with the proceeds of the wife's land conveyed directly to him, as a means of enabling him to obtain credit in his business transactions. The appellant agreed with the husband to sell her land and that a deed might be made to him provided he would arrange it, by will or otherwise, that if he died first she was to become the owner of the land bought with the proceeds of her land. This the husband agreed to do, as the proof clearly shows. Her land was sold and other land bought with the money, a deed made to the husband, who in a short time afterwards was taken suddenly ill and died without securing the property to the wife. The wife was induced to divest herself of the title to all her estate by reason of this agreement and on the part of the husband—it was his duty at the time he made the investment with

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her money to have complied with his agreement by either making a will or inserting some clause in the deed protecting the rights of the wife. This obligation he was under to the wife; he seems frequently to have recognized and was prevented from executing it by his sudden and to him unexpected death. If such inducements had been held out to a stranger, and he divested himself of the title to his land under such an agreement, there is no doubt but what a court of equity would have granted him relief, and there is a much stronger reason, it seems to us, for granting relief to the wife who, confiding in her husband's promises and desirous of gratifying his wishes, surrenders the title to all of her estate under such an agreement as the one proven. If the husband was living (under the facts proven) the chancellor would not permit him to hold the property without securing the wife, and as the death of the husband alone prevented him from executing the agreement, we see no reason why the chancellor should not now enforce it. We concur in the opinion rendered by the court below giving to the wife the land purchased with the proceeds of the sale of her own land. The judgment is affirmed.

Throop, for appellant.

Wadsworth & Taylor, for appellee.

FRANCIS CHALFANT & W. G. MORRIS v. O'BANNON ASBURY.

Trial—Verdict for Debt—Judgment May Include Interest.

"We the jury find for the plaintiff six hundred dollars as claimed in the petition." Upon this verdict a judgment was rendered for six hundred dollars with interest from the date of the note.

Held, that the verdict was in substance for the debt in the petition mentioned, and such a verdict authorized the court to render a judgment for the amount due and the interest thereon.

Interest—Lex Loci Contractus—Presumption—Burden of Proof.

The note sued on was executed in the State of Ohio, and appellants insist that no judgment could be rendered for the interest without first ascertaining, without proof, the rate of interest in that State.

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Held, that any indebtedness incurred or evidenced by judgment or decree rendered out of this State shall be presumed, unless the contrary be shown, to bear like interest as if it had been incurred in this State. The burden of proof is on the party charged to show the rate of interest where the note or contract was executed.

APPEAL FROM BRACKEN CIRCUIT COURT.

September 22, 1871.

OPINION BY JUDGE PRYOR:

The testimony of the witness Goldsburg establishes the partnership between himself and his co-defendants in the purchase and sale of tobacco, and the appellants are, therefore, liable on the note. The note is as follows: "Due O. N. Asbury on demand six hundred dollars," signed F. L. Goldsburg & Co., and dated Cincinnati, August 8, 1867. The petition alleges the agreement to pay on the 8th of August, 1867, and the non-payment of the money although often demanded. The jury upon the issue of *non est factum* made by appellants returned into court this verdict: "We, the jury, find for the plaintiff six hundred dollars as claimed in the petition," and upon this verdict a judgment was rendered for six hundred dollars with interest from the 8th of August, 1867. The note was due the moment it was executed by the appellants, and no demand was necessary, and the verdict was in substance for the debt in the petition mentioned, and such a verdict authorized the court to render a judgment for the amount due and the interest, as decided in the case of *Brannon & Smith v. Foree's Administrator*, 12 B. Mon. 506. The note was executed in the State of Ohio, and the appellants insist that no judgment could be rendered for the interest without first ascertaining without proof the rate of interest in that State. This rule of law has been changed by the *Revised Statutes*, 2d vol., page 65, as follows: "That any indebtedness incurred or evidenced by judgment or decree, rendered out of the State, shall be presumed, unless the contrary be shown, to bear like interest as if it had been incurred, or the judgment or decree rendered in this State." The burden of proof is now upon the party charged to show the rate of interest where the note or contract was executed, otherwise

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the rate of interest in this State will control. If the clerk, when entering the judgment, made it bear interest when it should not, it was a clerical misprision to be remedied as procided by sec. 580 of the code of practice. No motion was made in the court below to correct the judgment, and if heard upon the motion for a new trial as contended for by appellants' counsel the result would have been the setting aside the verdict and judgment for a mere clerical misprision. We are of the opinion, however, that the judgment was properly entered. The refusal to permit the Cincinnati directory to be read as evidence did not prejudice the appellants, and could not, so far as we can perceive, have affected the verdict of the jury.

Judgment affirmed.

Menzies, Furber, for appellants.

James Harlan, for appellee.

COMMONWEALTH OF KENTUCKY FOR THE USE OF JOHN S. PARRISH'S
ADMINISTRATOR v. P. C. BEDFORD.

Sheriffs and Constables—Collection of Money Without Execution—Default—Sureties Not Responsible.

A sheriff has no right to collect money upon a judgment by virtue of his office, and when he does so without first having an execution his sureties on his official bond are not responsible in case he fails to pay over the money to the plaintiff.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 11, 1871.

OPINION BY JUDGE PRYOR:

The debt in this case was not paid to the sheriff Bedford until the date of the receipt in October, 1864. No execution was then in the hands of the sheriff, as the proof of the clerk shows that none was issued after 1863. This execution had been returned by the sheriff and destroyed by fire with other records in the clerk's office long before the payment is alleged to have

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been made. There is no proof of any levy by the sheriff in 1863, or at any other time, on the property of the defendant in the execution, and as the sheriff had no right to collect the money upon a judgment by virtue of his office, his sureties are not responsible. The variance between the allegations of the petition and the proof as to the parties defendant in the execution is not such an error as would authorize a reversal of the judgment rendered against Bedford. The judgment is affirmed on the original and cross-appeal.

Reid, for appellant.

Apperson, for appellee.

MARION BURBRIDGE *v.* HERMON W. VARNON.**Bonds—Action on—Contract to Be Stated in Petition—Exhibits.**

A petition founded on a written obligation should state so much of the contract as to show the plaintiff entitled to a recovery by reason of the breach or the nonperformance of the undertaking by the defendant; and this requirement will not be dispensed with by the mere exhibition of the writing or a statement of the plaintiff's own conclusions of law as to its effect.

Pleadings—Insufficient Petition—Demurrer May Be Sustained or Judgment for Defendant.

Although a court might have properly sustained a demurrer to an insufficient petition, it may, on the submission of the case, render a judgment for the defendants.

APPEAL FROM SCOTT CIRCUIT COURT.

October 13, 1871.

OPINION BY JUDGE HARDIN:

The only statement in the petition of the terms or substance of the bond executed by Burbridge and the appellee is that "upon the 28th day of May, 1861, O. H. Burbridge, by the order of this court, executed a bond as committee of Marion Burbridge, with H. W. Varnon as his surety, which is also here filed, and which he is advised binds the said Varnon for all moneys received by said O. H. Burbridge as committee aforesaid for the

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faithful discharge of his duties, as committee and the performance of all orders and decrees of the court touching the trust in his hands *aforesaid*."

The first question to be determined, and the only one it will be necessary to consider, whether with reference to the contract sued on, the petition states facts sufficient to constitute a cause of action. It is a rule which has been repeatedly observed by this court, under our present system of pleading, that a petition founded on a written obligation should state so much of the contract as to show the plaintiff entitled to a recovery by reason of the breach or nonperformance of the contract by the defendant; and this essential requirement will not be dispensed with by the mere exhibition of the writing or a statement of the plaintiff's own conclusions of law as to its effect. *Hill for, etc., v. Barrett*, 14 B. Mon. 83; *Collins v. Blackburn*, Id. 252; *Montjoy's Administrator v. Pearce et al.*, 4 Met. 97.

. Applying this rule to the petition in this case, we are constrained to conclude that no sufficient cause of action, against the appellant, was set forth in the petition. It does not even show to whom the undertaking of the bond was made, whether to Marion Burbridge or some other person for her, or to the Commonwealth, nor what were its particular stipulations or covenants for the breach of which alone the surety could be held liable.

The court might properly have sustained the demurrer to the petition, or have treated it as insufficient and refused, on the submission, to render any judgment against the appellee Varnon. But as he has not complained of the judgment which was rendered against him, and the only inquiry on this appeal is as to the refusal of the court below, in the case as presented, to hold him bound for the proceeds of the shares sold under the decree of the court in the hands of O. H. Burbridge, we perceive no sufficient reason for reversing the judgment on this appeal. Therefore the judgment is affirmed.

Robinson, Darnaby, for appellant.

Breckenridge, for appellee.

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JAS. H. CUMMINS *v.* B. T. WHALEY'S ADMINISTRATOR.**Deed—Reservation—Consent of Vendor to Sale.**

When a deed contains the provision that no sale of the land shall be made without the consent of the grantor it is notice to the world of the reservations and conditions therein made.

Judgments—Consolidated Actions Binding on All Parties.

Where causes are consolidated the judgment rendered therein is binding on all the parties served with process in either action.

APPEAL FROM HARRISON CIRCUIT COURT.

October 18, 1871.

OPINION BY JUDGE PRYOR:

The deed from Benjamin Whaley to Benjamin T. Whaley was of record in the clerk's office of the Harrison county court at the time of the purchase of the land by both Whaley and the appellant Cummins. This deed contained the provision that no sale of the land could be made without the consent of the grantors Benjamin Whaley and his wife, and was notice to the world of the reservations and conditions therein made. Henry, under whose title the appellant claims, had notice of the lien of Benjamin Whaley on the land, and set it up as a defense to the suit against him to enforce the lien for the purchase money by Minor and claimed in his answer to be a party to the suit of Benjamin Whaley as his son, in which an effort was being made to annul the deed under which Henry claimed to have derived title. The case of *Minn v. Henry* was also consolidated with the suit of *Benjamin Whaley v. Mary Whaley, etc.*, and the judgment therein rendered was binding when all the parties had been served with process in either action.

Neither Henry nor the appellant Cummins can be regarded as innocent purchasers. There is no proof of any such consent by Benjamin Whaley as would authorize this court to divest him or his heirs of the title to this land, but on the contrary the evidence shows that he refused to sign the deed when called on for that purpose. We perceive no error in the judgment of the court below, and the same is now affirmed.

Trimble, for appellant.

A. H. Ward, for appellee.

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JOHN BELL, ETC., v. JOSEPH A. FARRIS ET AL.

Partition—How Made.

When parties are entitled to two or more shares in the same tract of land, these shares should be allotted together if it can be done without doing injury to the others interested. To allot each share entirely remote from each other or to divide the land so as to increase the fencing necessary to enclose the lots ought always to be avoided.

APPEAL FROM BATH CIRCUIT COURT.

After the death of Drury B. Boyd, his widow and children had the tract of land owned by him at his death partitioned between them, and ninety acres of the tract was assigned to the widow as dower—the widow afterwards died and the children all united in a petition to the county court of Bath for a partition of the dower of ninety acres. Boyd left three children, Wm. D. Boyd, Elizabeth Farris and Sarah L. Bell.

In the first partition of the land W. D. Boyd was allotted 107 acres and 5 poles. Mrs. Farris 84 acres, 1 rod and 12 poles, and Mrs. Bell 82 acres and 37 poles. In the partition of the ninety acres the commissioners allotted to W. B. Boyd 34.1 acres and 18 poles, and this adjoins his land allotted to him in the first division. They allotted to Mrs. Farris 14 acres and 27 poles, including the dwelling house and improvements, and by this allotment the tract of 42 acres allotted to Mrs. Bell lies directly between Mrs. Farris' two parcels of land. They then proceeded to allot to Mrs. Bell 34 acres, 1 rod and 20 poles of the dower, disconnected almost from the parcel first assigned her, making a sort of serpentine boundary to these two parcels as causes them to encircle almost the whole tract. Much additional fencing is made necessary by such a division and must necessarily lessen greatly the value of Mrs. Bell's land. If the commissioners had allotted to Mrs. Bell the 14 acres and 27 poles of land, it would have placed her land in good shape without impairing or lessening the value of the parcels allotted to the other children. As the land is now divided, Mrs. Farris can not reach her lot in the first division from the lot last assigned her without passing over the lot first assigned Mrs. Bell, and by giving to Mrs. Farris the 34 acres, she will only have to pass over the same ground.

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When parties are entitled to two or more shares in the same tract of land, these shares should be allotted together if it can be done without doing injury to the others interested. To allot each share entirely remote from each other or to divide the land so as to increase the fencing necessary to enclose the lots, ought always to be avoided if it can be done without injuring any of the parties interested. The lot of 14 acres and 27 poles assigned to Mrs. Farris should be allotted to Mrs. Bell, and Mrs. Bell's lot of 34 acres, 1 rod and 20 poles to Mrs. Farris, with the right to Mrs. Farris of passing over the lands of Mrs. Bell to the lot of land assigned her in the first division. This pass-way should be so designated and so laid off as not to injure the lands of Mrs. Bell more than is necessary. The judgment of the court below is reversed and the cause remanded with directions to make the allotment as herein indicated and for further proceedings not inconsistent with this opinion.

Reid & Stone, Hurt, for appellants.

Nesbitt, Apperson, for appellees.

COMMONWEALTH FOR THE USE OF CHRISTIAN COUNTY *v.* E. P. CAMPBELL.

Taxation—Bank Stock—Corporation Liable For.

The owner of bank stock is not required to list it with the assessor for taxation. The liability is on the corporation.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

October 4, 1871.

OPINION BY JUDGE PRYOR:

The proceeding by rule against the appellee requiring him to list his bank stock for taxation was properly dismissed by the court below.

The owners of bank stock taxed in this state are not required to list it for taxation, as it is expressly excluded by the statutes requiring a party to make up the estimate of his estate in leaving it with the assessor. *Louisville Saving Bank v. Commonwealth*, 14 B. Monroe 410. The appellee did all that he was required to

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do by the law, and the effort upon the part of the county court is to make him pay tax upon property that the law expressly exempts him from paying. The tax upon bank stock is to be paid by the corporation as provided by law, and if a liability exists in this case (a question we are not called on to decide) it is upon the part of the corporation, and not the undivided stockholders. The judgment of the court below is affirmed.

Wood, for appellant.

Campbell, for appellee.

COMMONWEALTH OF KENTUCKY v. JOHN LEWIS, ETC.

Bail—Surrender in Open Court—No Order Necessary to Relieve Sureties From Liability on Bail Bond.

It is true the record does not show that any order was made directing the sheriff to take charge of the prisoner; the presumption arises from the acts of the judge.

APPEAL FROM ROWAN CIRCUIT COURT.

November 14, 1871.

OPINION BY JUDGE PRYOR:

The evidence as appears from the record shows that the prisoner was surrendered at the instance of the security, taken charge of by the court and placed in the custody of the sheriff. When the prisoner was placed in charge of the sheriff, all power over him by his surety ceased, and he was released from liability on his bond. It is true the record does not show that any order of court was made directing the sheriff to take charge of the accused, nor does the record show that it contains all the proceedings and evidence in the case, and the presumption arises from the statement of the judge himself that then his act in releasing the surety was as provided by law. The judgment affirmed.

Attorney General, for appellant.

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HARRY CAMPBELL v. JOHN MAUPIN.

Landlord and Tenant—Covenant of Quiet Enjoyment—Trespass by Stranger.

A suit cannot be maintained by a tenant against his landlord on a covenant of quiet enjoyment where a stranger has trespassed on the premises unless it is alleged that he was the active agency in the wrong.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 12, 1871.

OPINION BY JUDGE HARDIN:

Admitting the correctness of the principle as contended for for the appellant, that in a contract for leasing the land implies a contract for quiet enjoyment, that is, that the rights of the landlord are such as to entitle the tenant to enter and quietly enjoy the leased premises under him; and waiving the objection that no covenant is set up in the answer and cross-petition, unless by mere implication, the answer is fatally defective in not alleging some active agency on the part of plaintiff, in inducing or causing the interruption of the enjoyment of the premises complained of. Certainly his implied covenant did not make him responsible for the mere trespass of strangers, nor for passively permitting them; and as the response pleaded imports no more than this, the demurrer was properly sustained.

Wherefore the judgment is affirmed.

Breckenridge & Buckner, for appellant.

Apperson & Reid, for appellee.

JOHN L. BROWN v. COMMONWEALTH.

Intoxicating Liquors—Local Option—License Discretion of County Court.

The granting of license to retail spirituous liquor is within the discretion of the county court, notwithstanding there has been a vote of the people on that question.

APPEAL FROM BOYD CIRCUIT COURT.

September 12, 1871.

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OPINION BY JUDGE HARDIN:

No valid objection is perceived to the constitutionality of the act of the legislature for determining the right to vend liquors in Catlettsburg by a vote of the people of the town, but if it be concluded that that vote should not alone have controlled the action of the county court, there does not appear to have been any abuse of the discretion of the court in refusing to grant the appellant license to retail liquors.

Therefore the judgment is affirmed.

Roe, for appellant.

Attorney General, for appellee.

COMMONWEALTH OF KENTUCKY FOR THE USE OF STEINAUGH, ETC.,
v. M. D. ROTHWELL, ETC.

Executions—Sale Under—Taking Bond—Sheriff's Return Prima Facie
Evidence Of—Lost Bond.

The sheriff's return on an execution that he has made a sale of the property and taken bond from the purchaser is prima facie evidence of the fact, but in an action on his official bond for failure to take a sale bond, it is incumbent on him to prove that fact, where the bond is lost or misplaced by him.

APPEAL FROM MUHLENBERG CIRCUIT COURT.

November 1, 1871.

OPINION BY JUDGE PRYOR:

In this case it is made to appear from the evidence that no sale bond was ever executed to the appellants for the amount of their execution. The return of the sheriff may be *prima facie* evidence that the sale was made and the bond executed, but in this strict proceeding against him it is incumbent on him to show that a bond was executed in order that the plaintiffs may make their money, and it certainly should be required of the sheriff, when the clerk testifies that no such bond was returned to his office. He can easily ascertain the names of the obligors

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if any such bond was given, and at least ought to be required to disclose them. The sheriff in this case, before he can be released, must enable the appellant to proceed against the parties on this sale bond that he alleges was executed for the amount of plaintiff's execution. He has credited the execution by the amount of the sale, and is certainly liable under this bond which was executed and returned to the office, and if lost, or misplaced by him, he must give the names of the parties signing it, and for this purpose he is permitted to amend his answer. The judgment of the lower court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Ricketts, for appellant.

M. D. Hay, for appellee.

A. SPURLOCK, ASSIGNEE, ETC., *v.* REUBEN JOHNSON, ETC.

Vendor and Purchaser—Deficit—General Rule as to Remuneration.

The general rule is that where the vendor of land is unable to make title to the whole tract sold and his vendee is willing to accept title for so much as he is able to convey, he shall make remuneration in damages or deduct from the price the proportional price of the whole tract for so much as he is unable to convey.

Vendor and Purchaser—Deficit—Special Value of Tract Not Conveyed—Pleadings.

In an action by a vendee to recover damages for deficit in land sold, the general rule will prevail, unless there is an allegation in the petition sustained by the proof, showing that the land which the vendor could not convey was more valuable per acre than that which he could convey.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

April 14, 1871.

OPINION BY JUDGE PETERS:

The terms of the title bond executed by Rowlett, in which he sells what was known as the Clark tract, binds him to convey

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one hundred and seven acres, and for the ascertained deficit he certainly is responsible, and so the court below adjudged, but made him pay more for the deficit than the proportional price of the whole tract which was sold to appellee at the price of seven dollars, twenty-four cents and a fraction per acre, while twenty dollars per acre were allowed in the judgment for the deficiency; and whether or not the court below erred in so adjusting the price therefor is the main question presented in this appeal.

The general rule is that where the vendor of land is unable to make title to the whole tract sold, and his vendee is willing to accept title for so much as he is able to convey, he shall make remuneration in damages or deduct from the price, the proportional price of the whole tract for so much as he is unable to convey, unless there are some elements rendering the part not conveyed of more value than that which was. In this case there is no averment of facts in the cross-petition showing that the land which the vendor could not convey was more valuable per acre than that which was conveyed, the land appears to have been purchased for tillage by appellees. The boundaries were well known to them before they purchased, as was the quality of the soil, and it is not improbable that they knew better than their vendor what number of acres were in the tract, as one of them lived adjoining it, and had known it longer than Rowlett had and no facts are stated in the pleadings, and none are proved to take the mode of estimating the allowance for the deficit out of the general rule, indeed appellees pray that the allowance therefore may be made *pro rata*.

The court below having adopted an improper criterion of value for the land Rowlett was unable to convey, which was prejudicial to appellant, the judgment must be *reversed*, and the cause remanded with directions to allow appellees credit on the unpaid price for the deficiency, at the same rate per acre that they by their contract agreed to pay per acre for the whole tract, and for further proceedings consistent herewith.

Carter, for appellants.

Holman, for appellee.

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A. ROBERTS *v.* C. KETCHEN.**Payment—Application of Payment as Between Particular Debts—Burden of Proof to Show that Another Debt Existed.**

Where a payment has been proven, it is incumbent on the plaintiff to show by proof that he had another debt against the defendant to which it was applied.

APPEAL FROM HENRY CIRCUIT COURT.

January 5, 1871.

OPINION BY JUDGE PETERS:

As early as 30th of October, 1860, appellee sent to decedent Roberts a statement of the amount of the note, interest, and exchange, with a request that he would make an acceptance payable at the branch of the Bank of Kentucky, in Frankfort, and it is proved by Smith that he paid to appellee for decedent about \$160 on an acceptance of the latter to the former, and took his receipt for the amount paid, the receipt is lost, and the time and amount paid are not precisely remembered by the witness but he fixes them to correspond substantially with the amount of the note sued on, and the date when the acceptance would mature.

Having proved this payment, if it was not to be applied to this debt, it was incumbent on appellee to show by proof that he had another debt against decedent to which it was applied, and this he has wholly failed to do. Nor does he account for his failure to sue the administrator of decedent after he dismissed his first suit on this note, if he intended again to make an effort to collect the same, where upon his first effort by suit his attorneys were satisfied that the proof of payment was so strong as to compel a jury to find against him. We cannot therefore concur in opinion with the circuit court, but are constrained from the evidence to conclude that the note had been paid off by decedent. Wherefore the judgment is *reversed*, and the cause is remanded with directions to dismiss the petition absolutely.

Barbour, for appellant.

Montfort, for appellee.

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L. H. ROSSEAU v. E. S. FALKENER, ETC.

Partnership—Agreement to Contribute Equal Amount to Capital Stock.

By the terms of the partnership each partner was to contribute equally to the capital stock. Appellant paid in more than any of the others. He was entitled to interest on that amount upon settlement of the partnership.

APPEAL FROM RUSSELL CIRCUIT COURT.

October 30, 1871.

OPINION BY JUDGE PRYOR:

The Commissioner in his report made on the 21st of May, 1868, shows that the appellant had paid in as capital stock in the Mill adventure, the sum of \$2,244.90. This report seems to be correct in determining the amount of money paid in as stock by each one of the partners. The court below in the judgment rendered, only credits appellant for capital stock by the sum of \$2,042.61, making an error as against appellant for \$202.33. By the terms of the partnership each partner was to contribute equally to the capital stock—that is, each partner was to pay in equal amounts. The appellant paid in some \$680 more money than the other partners and on this amount should have been allowed interest. For these errors only the judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

*James, for appellant.**Drane, for appellee.*

C. ROGERS, ADMINISTRATRIX, v. JOHN H. MCHENRY.**Bill and Notes—Assignment—Assignee Must Sue in First Court.**

Where the circuit and quarterly courts of the same county have concurrent jurisdiction, the assignee of a note must sue in the one holding its regular term first after the assignment.

APPEAL FROM DAVIESS CIRCUIT COURT.

September 20, 1871.

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OPINION BY JUDGE PRYOR:

The agreed facts in this case show that after the note was assigned to the appellee (it being then due) the regular term of the Daviess Quarterly Court began and was held on the second Monday in February, 1869, and that the regular term of the circuit court for the county began and was held on the third Monday in February, 1869. The judgment was obtained on the note in the circuit court on the 19th of March, 1869, and no execution issued until the 30th day of the same month. This court in the case of *Carter vs. O'Bryen* (M. S. opinion) decided that when the circuit and quarterly courts of the same county have concurrent jurisdiction in a case like this that the assignee must institute his action in the court holding its regular session first after the assignment is made.

The regular term of the quarterly court beginning first after the appellee became entitled to the note by the assignment, it was his duty to have instituted suit in that court, and having failed to do so his action cannot be maintained against the appellant. The judgment of the court below should be set aside and a new trial granted appellant and for further proceedings not inconsistent with this opinion.

Swope, James, for appellant.

McHenry, for appellee.

MILES ROBINSON, ETC., v. BLEVINS HUDSON.**Evidence—Record in Another Case not Competent.**

The record of the suit by Prior Harvey against Brewer was not competent testimony, as neither Robinson nor Brewer were parties to that suit.

Absentees—Appeal by Non-Resident—Appearance.

A non-resident defendant may take an appeal to the Court of Appeals and this would be an appearance to the action.

APPEAL FROM CLAY CIRCUIT COURT.

November 2, 1871.

Opinion of the Court.

OPINION BY JUDGE PRYOR:

The record of the suit by Prior Harvey against Brewer was not competent as testimony to show that Robinson at the time he sold the house to the appellee Hudson had no title. Neither Robinson nor Brewer were parties to the suit of Harvey, and there is nothing else in this record showing a want of title in the appellant. Even if Brewer himself had been sued by Harvey and a recovery had, in the absence of other proof this recovery would not be sufficient to show that the house sold by appellant to appellee was the property of Harvey. The non-resident defendant has the right to bring the case to this court by an appeal, and this is an appearance to the action. The judgment of the court below is reversed and the cause remanded for further preparation not inconsistent with this opinion. If the appellee is permitted to take additional proof by the court below the appellants should each be allowed to answer the amended petition of appellee.

Rodman, for appellants.

Scott, for appellee.

HUGH PRISLER *v.* A. SHWABESTON.**Vendor and Purchaser—Deficit—Knowledge of Vendor.**

The appellant knew when he made the sale that the tract did not contain two hundred and fifty acres. It was his duty to disclose this fact to the appellee at the time he sold him the land.

APPEAL FROM HARDIN CIRCUIT COURT.

October 14, 1871.

OPINION BY JUDGE PRYOR:

We perceive no error in the judgment rendered by the court below. The appellant knew when he made the sale of the land to the appellee that the tract did not contain as much as two hundred and fifty acres. He himself then had a deed of record for the same land and by this deed his vendor conveys to him only two hundred and five acres. It was his duty to have dis-

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closed this fact to the appellee at the time he sold him the land; this he failed to do, and should now be held responsible for the deficit.

The judgment of the court below is affirmed.

Stratton, for appellant.

Bush, for appellees.

MATTIE S. PAYNE, ETC., *v.* T. D. BAYZE.

**Husband and Wife—Necessaries—Writing Signed by Husband and Wife—
Personal Judgment.**

The statute makes the estate of the wife liable for necessities furnished when evidenced by a writing signed by herself and husband, but no personal judgment can be rendered against her.

APPEAL FROM SCOTT CIRCUIT COURT.

October 2, 1871.

OPINION BY JUDGE PRYOR:

It was improper to render a personal judgment in this case against the wife. The statute makes the estate of the wife liable for necessities furnished, when evidenced by writing, signed by herself and husband, but does not make here personally responsible for the debt. A judgment upon a case made out under the statute can only be against her estate.

The judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Darnaby, for appellants.

POLLY RAWLINGS *v.* L. J. BOSLEYS, ADMR.

**Improvements Made by Father on Sons' Property Subject to His Debts—
Assignee in no Better Position.**

If the sons permitted their father to make valuable improvements upon their real property, with funds he should have applied to the payment of his debts, they could not complain that their father's creditors should be allowed to subject such improvements to the payment of their claims, and their assignee, with knowledge of the facts, is in no better position than the sons.

APPEAL FROM WASHINGTON CIRCUIT COURT.

October 19, 1871.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

The improvements made upon the lots adjudged to be the property of Mrs. Rawlings were made whilst her two sons held the title bond of her vendors, the McVeys.

At that time she held neither the legal nor equitable title to said lots. If the sons permitted their unobedient father to make valuable improvements upon their realty, with funds he should have applied to the payment of his debts, and from the record we must assume that they did so with full knowledge of how such improvements were being made, they could not complain that their father's creditors should be allowed to subject such improvements to the payment of their claims. Mrs. Rawlings, who now holds the title as their assignee, took from them with notice of all the facts, and according to her own showing, without consideration as to the original value of the property. She is in no better position than the sons would have been if they had retained the title to the lots.

In so far as the improvements enhance the value of the property, appellee has a right to subject it to the payment of his judgment, and to that extent he holds a lien upon it.

Judgment affirmed. Judge Hardin did not sit in this case.

Broune, for appellant.

Hays, for appellee.

A. B. PATRICK, ETC., v. L. C. BOHANNON, ETC.**Vendor and Purchaser—Purchase Pendente Lite—Defense.**

A purchaser pendente lite can avail himself of no defense other than could have been made by his vendor.

Judicial Sales—Confirmation of Report of Sale—Appeal from Order.

Where no appeal is taken from an order confirming a master commissioner's report of sale, the Court of Appeals will not review the action of the lower court in that particular.

APPEAL FROM OWSLEY CIRCUIT COURT.

October 30, 1871.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

No objection was made in the court below to the prosecution of this action in the names of the heirs of Henry C. Bohannon, deceased, instead of his personal representatives, and it is admitted of record that said Henry C. Bohannon is dead, and that the plaintiffs are his heirs at law.

Patrick accepted the deed of his vendor, in which deed by operation of law a lien was retained on the land conveyed to secure the payment of the note sued on.

There is no evidence in the record that South sets up claim to any portion of the land for which the note was executed, as this was matter of defense, the duty was upon the appellants to establish the existence of such fact.

Hargis is a purchaser *pendente lite* and can avail himself of no defense other than could have been made by Patrick. No appeal is prosecuted from the order of the circuit court confirming the sale made by the commissioner in pursuance to the judgment in the cause, we therefore cannot review the action of said court in this particular.

The judgment appealed from is affirmed.

Lilly, Craddock, for appellants.

Rodman, for appellees.

JAMES S. SMITH *v.* COMMONWEALTH.

Indictment and Information—More than One Offense Charged—Demurrer.

Where more than one offense is charged in an indictment, except as provided for in Sec. 126, C. C., a demurrer is proper.

APPEAL FROM KENTON CIRCUIT COURT.

January 11, 1871.

OPINION BY JUDGE PETERS:

The defendants in the court below demurred to the indictment and their demurrer was overruled—and the propriety of that ruling presents the first question for adjudication.

By *Sub-sec. c of sec. 165, Crim. Code*, it is provided that

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when more than one offense is charged in an indictment, except as provided for in section 126, a demurrer is proper. Two offenses are charged in this indictment, and are not any of those provided for, or allowed to be joined by the last named section of the *Criminal Code*. Consequently, the indictment is bad, and the demurrer should have been sustained. Wherefore the judgment is reversed and the cause remanded with directions to sustain the demurrer to the indictment and for further proceedings in conformity with this opinion.

Fisks, Duncan, for appellant.

SWIFT'S IRON & STEEL WORKS v. WM. DYE.**Exceptions, Bill of—Statement that all the Evidence is Contained Therein.**

A bill of exceptions will not be considered on appeal, unless it contains a statement that all the evidence introduced on the trial is embodied therein.

Continuance—Amended Petition—Surprise—Affidavit.

It is not sufficient to authorize a continuance, where an amended petition is filed, for the party to state that he is surprised by the amendment. The facts should be presented in the form of an affidavit or in the bill of exceptions, which would show that the defendant could not be ready for trial at that time.

APPEAL FROM CAMPBELL CIRCUIT COURT.

May 23, 1871.

OPINION BY JUDGE PETERS:

The bill of exceptions does not contain a statement that all the evidence introduced on the trial is embodied therein, so that whether or not the verdict of the jury is sustained by the evidence cannot be considered by us.

The third instruction so qualifies the first, and second, as to present correctly the law of the case to the jury arising on the issues made by the pleadings.

It is not sufficient to authorize the continuance of a cause when an amended petition is filed for the party to state that he is surprised by the amendment; but the Civil Code requires that

the court shall be satisfied by affidavit or otherwise that the adverse party could not be ready for trial in consequence of the amendment and in order to enable this court to determine whether the court below abused its discretion in overruling the appellant's motion for a continuance when the amended petition was filed, the facts should be presented in the form of an affidavit or otherwise in a bill of exceptions which would show that appellant could not be or was not ready for trial at that time. Such facts are not presented in this record. *C. C. Sec. 163.*

Wherefore the judgment must be *affirmed*.

Webster, for appellant.

O. W. Root, for appellee.

THORNHILL & RICHARDSON *v.* JAMES T. FORD.

Bills and Notes—Assignment Invests Assignee with Equitable Right to Benefit of Lien—Written Transfer of Mortgage or Deed of Trust.

The assignee of a note is invested with the equitable right to avail himself of the benefits of any lien the assignor may have held to secure the payment thereof and a written transfer passes no greater interest in a mortgage or deed of trust by reason of its being mentioned in the writing, than it would have passed, if it had been omitted.

Bills and Notes—Fraud or Deceit—Maker's Estate Must be Prosecuted to Insolvency—Proof of Insolvency—Return of Nulla Bona.

An action cannot be maintained against the assignee of a note, where he is free from fraud or deceit, until the estate of the maker is prosecuted to insolvency, and no proof short of that furnished by a judicial determination or a return of nulla bona will suffice.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 18, 1872.

OPINION BY JUDGE LINDSAY:

The assignment of the note to Watkins, invested him with the equitable right to avail himself of the benefit of any liens the assignor, Ford, may have held to secure its payment. The written transfer passed to him no greater interest in the mortgage

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or deed of trust by reason of its being mentioned in the writing, than it would have passed if it had been omitted. Appellants allege that the only consideration for the payment of the five thousand dollars, or any part thereof, was the assignment of the lien on the real estate and the deed of trust, but in the conclusion of their petition they essentially modify this allegation by insisting that inasmuch as "the said note and transfer are of no value" they have been damaged in the sum of five thousand dollars, with interest, etc. Unless the note formed some part of the consideration the fact that it was worthless could not entitle them to recover damages. That it did form a material part of the consideration is made manifest by the testimony of the witness Watkins, who states that "the consideration for the note transferred purported to have been secured by the deed of trust was five thousand dollars and that amount was paid by me in cash when Ford signed the transfer." Again, "the transfer was intended to convey a note of Crenshaw for about six thousand dollars represented by said Ford to be secured by deed of trust." He also states that Ford added to the writing prepared by Booley & Simral, the stipulation that he would not be responsible on his assignment beyond the sale under the deed of trust, that if the land did not bring the amount of the note transferred, he was not to be called on for the difference. If the sole consideration was the transfer of the lien, or deed of trust, and the note was merely passed to enable the purchasers to enforce this lien, it would have been absurd for Ford to be requiring them to agree that they would not hold him bound on his assignment thereof. Throughout his entire deposition this witness speaks of the purchase of the note, and not of its incident, the deed of trust. The transfer was made to him, he was the intimate friend and confidant of Richardson, he accompanied him to Louisville to negotiate the purchase. He must be presumed to understand what was sold and for what the five thousand dollars were paid. It being established that this assignment of the note constituted part of the consideration, this action cannot be maintained, unless Ford was guilty of deceit in making representations known by him to be false and which were relied upon by Watkins and Richardson relative to the existence of the deed of trust lien. It is manifest that the estate

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of Crenshaw has not been prosecuted to insolvency, and it is proved by Alcorn, that while appellants held the assigned note which they do not pretend has been paid, that Richardson himself paid to Alcorn as attorney for said estate the sum of five thousand dollars. It therefore cannot be insisted that nothing could have been realized on the note, even if the appellants could be allowed to establish such facts, by any proof short of that furnished by a judicial determination of the insolvency, of Crenshaw's estate or a return of *nulla bona*.

The evidence does not justify the conclusion that Ford was guilty of fraud in making the sale to Watkins. Appellants sought him out at his home, when confined to his bed by sickness. It is not made to appear that he knew anything whatever of the execution by Hunter, the trustee, of the paper directing the clerk of Calloway county to endorse on the margin of the deed book in which the trust deed was recorded, the release of the lien, nor of any arrangement made by his partner Downing with Crenshaw's administrator that such release should be made. It may be fairly implied from everything presented by the records that Richardson who had more interest in the Crenshaw lands than Ford was better acquainted with the condition of this title. It will be observed that whilst appellants charge in their petition that they relied upon the statements of Ford, and the recital in his transfer to the effect that the trust lien was then in existence, they failed to state that they were not apprised of the existence of the paper executed by Hunter, the trustee, and the letter written by Downing. These papers were executed and written on the 22d day of February, 1861, only four days after appellants had purchased the Crenshaw lands. They were addressed to the probate clerk of the county in which their title was recorded or required by law to be recorded. There is no reason why this clerk who seems also to have been Crenshaw's administrator, should not at once have entered the release as directed, and remove the cloud from the title of appellants unless there was some misunderstanding between the parties, that the release was not to become effectual until some other arrangement was consummated. Whether or not Richardson was a party to this arrangement can not now be ascertained by reason of the death of the actors, but as the lien was upon

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land which he had first purchased, and as he was interested in having it removed, as he was indebted to Crenshaw's estate in an amount exceeding the lien debt, it is but reasonable to conclude that he must have known something about a transaction in which he was thus interested. It is true that Alcorn says that Richardson was surprised when he told him of this release. He does not state how the surprise was manifested, and it is remarkable that he made no mention of Richardson, saying that he knew nothing of the existence of the release before that time. Considering all the facts presented by the record, we incline to the conclusion that the compromise of this suit with Crenshaw's representatives rendered the note and assignment of the trust deed valueless to appellants, and that this is the real reason why they desire a rescission of their contract of purchase from Ford. Feeling assured that appellee was guilty of no deceit or fraud in the transaction, we are of opinion that no recovery can be had against him on his contract of assignment under existing circumstances.

Wherefore the judgment of the chancellor must be affirmed.

Bodley & Simrall, for appellant.

Caldwell & Bramblett, for appellee.

J. B. WILDER & CO. v. L. PEPPER & CO.

Assignments for Benefit of Creditors—Mortgage to Secure Debt Part of Which was Previously Due—Acts of 1856.

Where an insolvent debtor executes a mortgage on his property to secure the payment of a debt some of which was previously due, however inconsiderable that debt may be, it brings the conveyance within the inhibitions of the Acts of 1856.

APPEAL FROM CALDWELL CIRCUIT COURT.

December 17, 1871.

OPINION BY JUDGE LINDSAY:

The answers of the two appellees, Barkley and Pepper, are vague and unsatisfactory. Neither of them offer any explanation whatever, as to the creation of the indebtedness the mortgage was intended to secure. Barkley in his deposition states

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that it was the assumption by Pepper of his indebtedness to Cloud and Aiken and yet Pepper in his answer filed six months after the execution of the mortgage states that Barkley was still indebted to Cloud and Aiken, in the full amount of the two debts. Barkley swears he (Pepper) assumed to pay. In addition to this fact it is developed by the record that a portion of the drugs mortgaged to Pepper passed through his hands to Cloud and Aiken, considering the further fact that Pepper was the attorney for Cloud and Aiken and had their claim against Barkley in his hands for collection. We can not escape the conclusion that the mortgage was intended to secure their claims, and that it was made to Pepper to mislead other creditors as to the real consideration, and thereby prevent proceedings to subject the property under the Act of 1856. But if we are mistaken in this view, the judgment must be reversed for another reason. At the time the mortgage was executed the two debts due Cloud and Aiken did not (interest and cost included) amount to the sum of seven hundred and fifty dollars, and that fact taken in connection with statements made by Barkley at the close of his deposition leaves no doubt but that a debt previously due from the witness to Pepper was also included in the mortgage. However inconsiderable that debt may have been, it brings the conveyance within the inhibitions of the Act of 1856. There being no room to doubt that it was executed to prefer Cloud and Aiken, and Pepper to the exclusion of the other creditors of the grantor, and that it was made in contemplation of insolvency.

Wherefore the judgment dismissing appellant's petition is reversed, and the cause remanded for further proceedings consistent with this opinion.

Pirtle and Caruth and R. H. Darby, for appellant.

T. Z. Morrow, for appellees.

GEORGE YOUNG v. PETER YOUNG.

Witnesses—Competency of Divorced Wife—Bill of Exceptions Must Show What She would Have Proven.

Where the court reject the divorced wife as a witness against her husband, what she would have proven must appear in the bill of exceptions.

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Divorce—Alimony—Support of Infant Children—Husband not Relieved.

The allowance of alimony to the wife is only an adjudication of her right and does not relieve the husband of the obligation to provide necessaries for his infant children, and when such necessaries are furnished by another he is bound therefor.

APPEAL FROM JEFFERSON CIRCUIT COURT.

March 2, 1872.

OPINION BY JUDGE HARDIN:

We can perceive no error in the refusal of the Court to allow the petition in the divorce case to be read as evidence; nor do we think there was any available error in the action of the Court in rejecting Mrs. Young as a witness, from the fact occurring at the time as shown by the bill of exceptions, as it does not appear that she would have proved any particular thing, if permitted to testify, which it was competent for her to prove. We are nevertheless clearly of opinion that after the divorce she was competent to testify for or against her late husband, except as to matters known to her through or by reason of the marriage relation, or communications made by him to her during the marriage, and except also, of course, any matters as to which she might, by interest, or other like disqualifying cause have been an incompetent witness.

But on another ground the judgment will have to be reversed. If the order allowing temporary alimony to Mrs. Young, at the rate of \$7.00 per week, operated, although not paid, to restrict the right of the appellant to furnish necessaries to her afterwards, and while that order was in force, to a greater amount than thereby contemplated as sufficient for her support, as that order was at most but an adjudication of the wife's right to a provision, or to obtain necessaries from others—it did not relieve the husband of his obligation to provide necessaries for his then infant children; and if, notwithstanding the allowance to their mother, more was needed for their maintenance, and furnished by the appellant, the jury should not have been restricted from allowing it in their verdict, and the instructions having that

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effect were therefore erroneous. Therefore the judgment is reversed and the cause remanded for a new trial, and for further proceedings not inconsistent with this opinion.

Clemmons & Willis, for appellant.

Muir & Bijou, for appellee.

G. W. SALLE v. G. W. HURT, ETC.**Trials—Instructions—Exceptions and Objections.**

An exception to an instruction is not sufficient to authorize the Court of Appeals to inquire into the error, if there be one, in giving an instruction, it must be objected to when asked for, and then the ruling of the court, if given, excepted to.

Trials—Explanation of Instruction by Court.

Where the court explains the instruction to the jury, the error, if one, cannot be made available in the Court of Appeals unless excepted to at the time.

APPEAL FROM CLINTON CIRCUIT COURT.

December 20, 1870.

OPINION BY JUDGE PETERS:

Even if it can be said that the verdict of the jury is against the weight of evidence, the preponderance certainly is not so decidedly against it, as to authorize this court to interpose and award a new trial on that ground against the opinion of the circuit judge.

Nor can we review the action of the court below in giving instructions as asked by appellee.

All the instructions asked by appellant were given, as were those asked by appellee, and at the close of those given for appellee, the bill of exceptions contains the following statement, "*To which plaintiffs excepted.*"

That exception as was held by this court in *Kennedy & Bro. vs. Cunningham*, 2 Met. 538; *Letton, etc., vs. Young, etc.*, *Ib.* 558, and in *Cox vs. Winston*, 3 Met. 577, is not sufficient to authorize this court to inquire into the error, if there be one, in granting

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the instructions; they should have been objected to, when asked for, and then the ruling of the court if given excepted to.

This ruling has been so long established as the meaning of *Section 364 of C. C.*, and so often announced, that it should not now be departed from.

If the explanations given by the circuit judge of the instructions given to the jury when they returned after having retired to consult on their verdict, were prejudicial to appellant, which from his statement in the bill of exceptions is not satisfactorily manifested, still we think appellant should have excepted to it at the time to make it available as an error.

The affidavits under the repeated rulings of this court were insufficient to authorize a new trial. Wherefore the judgment must be affirmed.

Lindsey, J. E. Hays, McKee, for appellant.

James, Winfrey & Winfrey, Brents, for appellees.

 LEE C. SMITH v. JOHN WARTH, ETC.

Adverse Possession—Husband Occupying Wife's Land Cannot Claim Adversely to Her—Tenant by the Curtesy—Mortgage Passes Only Life Estate.

Where a husband enters upon land with his wife, and in her right, under an arrangement with the executor of her father, he cannot, while thus occupying, set up an adverse claim to her. He has only a life estate by the curtesy and nothing more passes by his deed or mortgage.

Appeals and Errors—Claim Against Decedent's Estate—Exception to Order Overruling Exception to Commission's Report—Bill of Evidence—Claim Properly Verified.

No exceptions were taken by appellant to the opinion of the court in overruling his exceptions to the commission's report of the settlement of the estate and in the absence of a bill of evidence, showing that the claim was properly verified and proved, it will be presumed that the court adjudged correctly.

Estoppel—Procuring Another to Advance Money on Faith of Mortgage—Title Cannot be Denied.

Where a party is active in procuring another to advance money on the faith of a mortgage he is estopped to deny the title of the mortgagor to the property.

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APPEAL FROM HARRISON CIRCUIT COURT.

December 16, 1871.

OPINION BY JUDGE PETERS:

It appears by a decided preponderance of the evidence that the land in controversy with the part adjoining it conveyed by the co-devisees of Henry Spears to him was purchased by the executors of, and paid for with the means belonging to, the estate of Christopher Spears, the father of Mrs. Henry Warth, wife of Abram Warth, deceased, and that he entered on the land with his wife, and in her right, under some arrangement with the executors, and the other devisees of her father, and having entered upon the land and resided on it—with his wife—he could not, while thus occupying, set up an adverse claim to hers successfully. But the evidence is that he claimed it as her land, he had therefore only a life estate as tenant by the curtesy, and nothing more passed by his deed of mortgage to appellant's testator.

It appears in the record that a personal judgment had been previously tendered against David Warth and James Warth, original obligators in the first note to Boulden, and Peter Smith loaned the \$4,000 to Abram Warth to pay the unpaid balance of that debt, which judgment would be as available to appellants as a second one for the same demand.

No exceptions were taken by appellant to the opinion of the court below in overruling his exceptions to the commissioner's report of the settlement of Abram Warth's estate, and in the absence of any bill of evidence showing that the claim was properly verified and proved, this court must presume the court below adjudged correctly.

Henry Warth was only the surety of Peter Smith that he would raise the money and pay the residue of the debt to Boulden, he was not a principal debtor, and therefore appellants were not entitled to a personal judgment against him.

The judgment therefore on the original appeal is *affirmed*.

On the cross-appeal Henry Warth and David Warth were active in getting Peter Smith to advance his money to pay the debt on the faith of the mortgage to be executed by their father, Henry assuring him that it should be done, and undertaking to

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answer for his father's compliance; David was one of the original debtors and participated in the arrangement. By the part they took in the matter they are estopped to deny that their father had title to the land, and to defeat the mortgage.

Wherefore the judgment is affirmed on the cross-appeal.

Trimble, Huston, for appellant.

J. W. PHELPS & CO. v. WM. V. LOVING & CO.

Attorney and Client—Lien for Attorney's Fees—Suit to Set Aside Fraudulent Conveyance—Judgment for Defendant—No Lien.

An attorney has a lien upon all choses in action, accounts or other claims or demands put in his hands for suit or collection and upon the judgments recovered. But he is not entitled to a lien where he represents a defendant in a suit to set aside a conveyance as fraudulent against creditors, where the judgment dismissed the action only.

APPEAL FROM BUTLER CIRCUIT COURT.

November 1, 1871.

OPINION BY JUDGE PETERS:

By an act of the Legislature approved January 26, 1866, Myer's Supp. 685, a lien is given to an attorney upon any choses in action, account or other claim, or demand put into his hands for suit or collection, and upon judgments in actions prosecuted by him to recover, when the judgment is for money, for the amount of any fee which may reasonably have been agreed on by the parties. Or in the absence of such agreement, for a fair and reasonable fee for the services of such attorney.

Appellees were allowed the fees complained of, not for prosecuting a suit, or suits on choses in action, accounts or demands put in their hands, or the hands of either of them, nor were there any judgments for money in either of the cases in favor of their clients, but they were the attorneys for Hosey against whom Phelps and others were prosecuting suits to subject a tract of land to the payment of debts, which they held against Hosey's vendor, on a charge that the conveyance as to them was fraudu-

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lent—and the judgment recovered by their client for whom they were defending said suits was to dismiss the petitions against him, and that he should recover their costs against them. It is apparent from an inspection of the *Act, supra*, and the character of the judgment, that it was not such as authorized the court to take any action in their favor. The court had no jurisdiction to render the judgment which this suit seeks to record, nor had appellees any lien, from anything that appears in the record, on the land which was the subject of the litigation, in which they represented said Hosey.

It will be time enough to decide on what property the Act of 21st of January, 1871, 1. vol. sess; Acts, 1871, p. 5, gives attorneys liens for their fees, and the effect of that act, when a case shall arise subsequent to its passage. The allowance to appellee was made prior to that act, and as it only took effect from its passage, and had no retrospective operation, this case is not embraced by it. Wherefore the judgment is reversed, and the cause is remanded with directions to dismiss the petition.

James, for appellant.

JOHN H. SARGEL v. UNITED STATES FIRE & MARINE INSURANCE
COMPANY.

Insurance—Misrepresentation by Insured Vitiates Policy.

Appellant accepted the policy of appellee with the proviso therein, "that in case the assured shall already have made other insurance, or may hereafter make other insurance on the hereby insured premises, notice of the same shall forthwith be given to this corporation. The day after appellant had effected insurance in appellee he had the same property insured in another company without giving appellee notice thereof;

Held, that the acts of appellant forfeited the policy he held on appellee.

Insurance—Forfeiture of Policy—Return of Premium.

Where a policy of insurance is forfeited by the violation of its terms by the insured he cannot recover the premium paid thereon.

New Trial—Grounds for—Witness Examined Before Trial—Issues Presented—Evidence Must Change the Result.

Many of the witnesses where evidence is desired were examined by the appellant before the trial and those not examined were upon

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issues presented by the pleadings and the evidence, if in, is not of such character as would certainly change the issue.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 12, 1871.

OPINION BY JUDGE PETERS:

Appellant accepted the policy of appellee, on which this suit is brought, with the following amongst other provisos: That "in case the assured shall already have made any other insurance of shall hereafter make any other insurance on the hereby insured premises, notice of the same shall forthwith be given to this corporation and have the same endorsed on this policy. Or otherwise, acknowledge in writing by this corporation, or in default thereof this policy shall be of *non effect*."

It appears from the evidence that the day after appellant had effected an insurance in appellee, he had the same property, or a part of the same, assured in another company, for he alleges in his petition that all the property he had, appellee insured, and failed to notify appellee of the last insurance, he does not allege that he gave notice of the second insurance to appellee, or that appellee was otherwise apprised of it, and acquiesced therein. So far from making any such allegations, he charges in his petition that the risk was taken by appellee with a full knowledge on its part of his having previously insured with the Louisville Insurance and Banking Company, and if the fact was not endorsed on the policy of appellee, the same was omitted by the mistake, or fraud of appellee, although the policy of the latter is dated the day before the one taken from the Louisville Insurance and Banking Company.

It cannot be material therefore as this case is presented by the other allegations and evidence whether Parcell was appellee's agent or not, because appellant was mistaken when he informed him that he had insured in the Louisville Insurance and Banking Company several days before he insured with appellee, and then accepted its policy with the condition quoted, which it was his duty to read and understand, and there is no evidence of any fraud on the part of appellee.

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The case appears to have been submitted for final hearing on appellant's own motion, and the reasons assigned for setting aside the hearing were insufficient, nor were sufficient grounds made out for a new trial. Many of the witnesses whose evidence he stated he desired to take had been examined by him before the trial, and the facts to be proved by those he had not examined were issues presented by the pleadings, and no sufficient reasons are shown why the evidence was not discovered before the trial—nor is their evidence, if in, of such a character as would certainly change the result.

As to the amount of premium paid to appellee for the risk, the policy was forfeited by the violation of its terms by appellant, and it does not satisfactorily appear that in equity he is entitled to have it refunded.

Wherefore the judgment is affirmed.

Marshall & Clark, for appellant.

Coke & Arbegust, for appellee.

LEWIS D. TOLLS AND WIFE *v.* EUPHEMIA SOWARD.**Pleadings—Answer and Cross-petition—Joint Obligations—Demurrer.**

While the answer and cross-petition alleges that from the death of Richard Soward, Sr., till September, 1867, the plaintiff, Euphemia Soward, and her two sons, Richard and John Soward, had the possession and use of the share of the defendant Anne, in the real estate of her father, and that the use of it was worth one hundred and twenty dollars per annum, it fails to allege either a joint renting or occupancy, or a joint obligation to pay the rent. The allegations of the cross-petition may all be true and yet the appellee may have had the use of some inconsiderable portion of the land, separate from her sons.

APPEAL FROM FLEMING CIRCUIT COURT.

January 29, 1872.

OPINION BY JUDGE HARDIN:

The positive testimony of John W. Soward, that the money and property alleged to have been paid on the judgment against

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the appellee, was in fact paid and accepted, is not, in our opinion, overcome by the other proof of the same facts and circumstances, conducing to the conclusion that the money and property were given or advanced by the appellee, to Mrs. Tolls, and not intended to go as a payment for this amount on the judgment; and this view is strengthened and fortified by the fact that it is neither alleged nor proved that the circumstances of the appellee were such as to enable her to give or advance the money and property to Mrs. Tolls, and still stands bound to pay the judgment against her. It is insisted, however, that although the demurrer of Richard and John W. Soward was sustained to the cross-petition of Tolls and wife against them, and their mother, as the latter did not answer, it ought to have been taken for confessed against her, and the claim for the rent therein set up applied to the extinguishment of the matters presented in the petition as payments on the judgments. But there are two fatal objections to this. First, that while the answer and cross-petition alleges that from the death of Richard Soward, Sr., till Sept., 1867, "the plaintiff, Euphemia Soward, and her sons, Richard and John Soward, had the possession and use of the share of the defendant Anne in the real estate of her father" and that the use of it was worth one hundred and twenty dollars per annum, it fails to allege either a joint renting or occupancy, or a joint obligation to pay the rent; and the allegation of the cross-petition may all be true and yet the appellee may, at least during each year, have had the use of some inconsiderable portion of the land, while her sons separately used the residue under a distinct and separate liability or undertaking for the payment of rent, and second, that the money and property, being set up and shown to have been considered as payments on the judgment, and not as mere set-offs against the claims for rent, if confessed to its fullest extent, however available in an original action, could not be used to defeat the defense of payment.

Therefore the judgment is affirmed.

H. Taylor, for appellant.

Andrews & Fister, for appellee.

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SANFORD J. POSTON *v.* R. C. HAYS.**Limitation, Statutes of—Absence from the State—Intention to Sue.**

This action was brought nearly 21 years after the cause accrued. The statute of limitation is relied on as a bar. The statute would have been a bar if appellant had not by some act of his prevented the running. There is some proof that some years after the maturity of the note he removed from the state and remained several years, but there is no evidence tending to show that appellee had any intention of enforcing the collection of the debt by suit before the departure of appellant from the state.

APPEAL FROM HARDIN CIRCUIT COURT.

September 27, 1871.

OPINION BY JUDGE PETERS:

This action was brought on the 19th of April, 1870, to enforce the collection of a note executed by appellant and due the 11th of May, 1849; the action was brought nearly 21 years after the cause accrued.

With other defenses the statute of limitations and the plea of payments are relied on.

On the trial of the cause the law and facts were submitted to the judge who rendered judgment for appellee.

The statute of limitations would certainly have presented a complete bar if appellant had not by some act of his prevented its running, and there is some evidence conducing to show that some years after the maturity of the note he removed from the state, and remained several years, but the precise length of time he was absent is not made out, there not being any evidence however tending to show that appellee had any intention of enforcing the collection of the alleged debt by suit before the departure of appellant from the state, or that he was in any way obstructed in bringing an action on the note if he had intended to do so; and it is left in doubt from the evidence whether appellant was not in the state the full term of fifteen years before the action was brought. But waiving the question as to whether the statutory bar was not fully made out.

Still we think the lapse of time with other facts shown by the evidence was sufficient to raise the presumption of payment, and

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that the conclusion of the circuit judge was against the decided preponderance of the evidence.

Wherefore the judgment is reversed, and the cause is remanded for a new trial for further proceedings not inconsistent herewith.

Murray, for appellant.

Montgomery & Slack, for appellee.

TRUSTEES OF THE TOWN OF RICHMOND v. WM. J. WALKER.

Municipal Corporations—Extension of Boundary—Power of Taxation—Police Power.

By an act of the legislature the boundary of the town of Richmond was extended so as to include the dwelling house and farm lands of appellee, which land was used for agricultural purposes only. There were no streets or lots laid off on this or adjacent lands. The trustees of the town attempted to collect taxes on the property of appellee included in said extensions, which he enjoined.

Held: The legislature can extend the boundaries of towns and include adjacent lands, without the consent of the owner, but this extension of territory does not necessarily carry with it the power of taxation. The police authority of the town may extend over the new territory for its own protection.

APPEAL FROM MADISON CIRCUIT COURT.

October 3, 1871.

OPINION BY JUDGE PRYOR:

By an act of the legislature approved January 8, 1868, entitled an act to incorporate and reduce into one all acts in regard to the Town of Richmond, it is provided, "That the Town of Richmond shall include and is hereby declared to be, all the territory lying and being within three quarters of one mile of the court house in said town, and the limits of said town shall extend that distance from the court house in every direction." Walker, the appellee in this case, at the time of the passage of this act owned a farm near the town, containing about three hundred acres, upon which his dwelling house is situated.

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The trustees of the town, determining that his house and about sixty acres of his land was within three-quarters of a mile of the court house and therefore within the town limits, had this portion of his land, including the dwelling, assessed for taxation and the marshal of the town, upon the refusal of appellee to pay the tax that had been created by the levy, levied upon appellee's property. The appellee by his petition in equity obtained an injunction enjoining the collection of this tax, and alleges that the trustees had no legal or constitutional right to tax his lands, etc. The allegations of the petition as well as the proof shows that this land is pasture land and used alone for agricultural purposes; that no part of the same was ever included within the boundary of the town until the act of January, 1868, and further, that the appellee received no benefit or advantage from this extension of boundary that he did not have previous to the passage of the law. There is no street or lots laid off, either on or adjacent to appellee's land, and no such increase of population in that part of the town, as would require an extension of police power. It is true that the appellee is a merchant in the town and that his family and the children have the benefits of the schools and churches, but upon the same terms that others have by contributing from his funds for the exercise of these privileges. He has a business house in the town upon which he pays his taxes as the rest of the citizens. The trustees would have the same power to include his whole farm in the town that they have the sixty acres if no part of it was a greater distance than three-quarters of a mile from the court house. The legislature can extend the boundaries of towns and include adjacent lands, without the consent of the owner, but this extension of territory does not necessarily carry with it the power of taxation. Unless this land thus included is laid off into city lots by the owner, and used for town purposes, it cannot be subjected to taxation. *City of Covington vs. Southgate*, 15 B. Mon. 498, or as decided by this court in the case of *Sharp, Executor, v. Donlin*, 17 B. Mon., when the population becomes dense in the neighborhood of the extended boundary, with streets, alleys and buildings surrounding it, then the trustees might require the owner to pay tax. There is no analogy, however, between the case last referred to and the one before the court. We perceive no reason why the police au-

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thority of the town may not extend in this case over the land embraced within the boundary if necessary for the protection of the town and vicinity, but upon the question of taxation we think the facts present a clear case of the taking of the private property for public use without compensation, the object of the enactment being to bring revenue to the town, without regard to the rights of the appellee.

Judgment affirmed.

C. H. Breck, for appellant.

Caperton, for appellee.

L. D. STEADMAN v. OLDHAM, SCOTT, ETC.

Judicial Sales—Taxes—Surplus Will be Paid to Defendant.

The Master Commissioner will not sell more property than will be sufficient to pay the debts. And if upon the coming in of his report it shall appear that the taxes are not due, the amount thereof will be paid to the appellant, if not needed to pay creditors.

APPEAL FROM SCOTT CIRCUIT COURT.

April 28, 1871.

OPINION BY JUDGE PETERS:

Feeling from the very earnest petition of appellant's counsel that it was proper to re-hear this case lest some injustice might have been done his client, we have again examined the record and see no cause to depart from our first conclusion.

The pleadings and exhibits show a number of debts of very large amounts compared with the size and value of the tract of land mortgaged to secure them, none of which are controverted except that of Oldham and Scott's, and from evidence that must be regarded as justly due.

The commissioner will not sell more property than will be sufficient to pay the debts. And if, upon the coming in of the Master's report it shall appear that the taxes named in the judgment are not due, the amount thereof will be paid to appellant, if not needed to pay creditors.

Opinion of the Court.

It does not seem that there is any error in the judgment prejudicial to appellant.

Wherefore the judgment is affirmed.

Polk, for appellant.

Kinkead & Buckner, for appellee.

DUDLEY SMITH, ETC., v. W. H. SANDFORD & Co.

Pleading—Amended Answer—Offer to File After Conclusion of Evidence—Facts Already Stated or Known to Defendant When Original Answer is Filed.

The court does not abuse its discretion by refusing to permit an amended answer to be filed, on the conclusion of the evidence, which sets up a defense already plead in the original answer, or facts known to the defendant when he filed his original answer.

APPEAL FROM GALLATIN CIRCUIT COURT.

January 4, 1871.

OPINION BY JUDGE PETERS:

Upon the trial of this cause in the court below after a judgment in favor of appellants had been reversed by this court, and after the evidence on both sides had been concluded, they tendered, and asked to be permitted to file an amended answer containing a statement of facts which constituted a special plea of *non est factum*, concluding in these words. They therefore say that said note is without consideration in whole, or in part; because the plaintiff, W. H. Sandford, did not go with him to the city of Louisville as he agreed to do in said contract at the time of signing said note in blank, and did not in any wise do as he agreed to do looking to the release of defendant's son. He says that said note was filled up fraudulently by plaintiffs for \$577.80, instead of \$325.00 as aforesaid.

Whether it was intended by this amended answer to rely on the plea of no consideration, as the conclusion quoted would seem to indicate, or whether it was intended as a plea of *non est factum* cannot be material, for if the first-named defense was in-

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tended that was already in and the appellants were not prejudiced by the refusal of the court to permit it to be filed, and if the latter was intended, all the facts stated in the amended answer were known to appellants when they filed their original answer, and it was no abuse of discretion in the court below to refuse to permit them to file it. *Barbour v. Moss, Admr. opinion: 1857.*

Nor can we, in view of the pleadings and evidence in this case and the former opinion of this court, adjudge that the court below erred in giving a peremptory instruction complained of.

Wherefore the judgment is *affirmed.*

Drane, for appellee.

FRITZY RAWBOLD, ETC., v. WM. WILSON.

Taxation—Distress—Receipt Presented.

Before an officer can distrain for taxes he must tender to the taxpayer a receipt specifying the taxable estate with which he is charged, the value and amount thereof and the taxes due.

APPEAL FROM HARDIN CIRCUIT COURT.

December 21, 1870.

OPINION BY JUDGE PETERS:

After a careful examination of the very elaborate pleadings and arguments in this case, we conclude that as it appears from the answer and receipt filed as a part thereof that the marshal who made the distress for the taxes claimed did not before he made said distress tender to appellee a receipt specifying the taxable estate with which he was charged, the value, and amount thereof, and the tax due, as it was his duty to do under sec. 26 of the Act of February 26, 1868, to incorporate the town of Elizabethtown, and the court below correctly sustained the demurrer to part of the answer.

The constitutionality of said act, and the propriety of the finding of the jury, are questions not before us on this appeal, and upon which we express no opinion.

Judgment affirmed.

Wintersmith & Cofer, for appellants.

Wilson, for appellee.

Opinion of the Court.

WASHINGTON SPRADLING, EX'R, *v.* HENRY COYZENS.

Trials—Inconsistent or Contradictory Defenses.

The defenses relied upon by the appellee are not necessarily inconsistent nor contradictory. The note may have been given without consideration, and still may have been paid or compromised to avoid litigation.

Trials—Instructions—Technical or Verbal Error—Preponderance.

Where the evidence preponderates in favor of the finding of the jury, the Court of Appeals will not reverse for a mere technical or verbal error.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

April 27, 1871.

OPINION BY JUDGE LINDSAY:

The defenses relied upon by the appellee are not necessarily inconsistent nor contradictory. "The note may have been given without consideration, and still Coyzens, to avoid litigation may have paid it, or compromised with Spradling the claim growing out of the same." We do not think either the note or the mortgage, which was not relied upon by appellant estopped the appellee from pleading want of consideration as to the note.

Whilst one of the instructions given at the instance of appellee is somewhat inartfully drawn, it was not calculated to mislead the jury, and in a case like this where the evidence preponderates in favor of the finding of the jury, this court will not reverse for a mere technical or verbal error which could not have operated injuriously to the party complaining.

Judgment affirmed.

Harrison, for appellant.

Wards, for appellee.

R. H. ROWSSEAU *v.* J. F. SHECKLER.

Judgments—Final Judgment—Order Sustaining Attachment.

An order of court authorizing the plaintiff to withdraw the proceeds of the attached property from the hands of the officers, is in effect to sustain the attachment, and is a final judgment so far as the order of attachment is concerned.

Opinion of the Court.

Attachment—Failure to Execute Bond—Proceeds Paid to Plaintiff.

It is error to pay over to the plaintiff the proceeds of attached property without the execution of the bond required by section 440 of the Civil Code.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

April 29, 1871.

OPINION BY JUDGE LINDSAY:

The order of court authorizing the plaintiff to withdraw the proceeds of the attached property from the hands of the officer, and thereby to put it out of the control of the court, was in effect to sustain the attachment. Section 250 of the Civil Code provides, that "If judgment is rendered for the plaintiff, the court shall apply in satisfaction thereof, the proceeds arising from the sales of perishable property, etc." This order applied to the payment of the appellee's claim the proceeds of attached personal property. It is true no personal judgment was rendered against Rowsseau who was not before the court but by the services of summons the claim of Sheckler was distinctly recognized and paid." He sought no further relief, and could be entitled to none in this proceeding. "Hence the case was finally disposed of so far as the order of attachment was concerned, and this appeal is properly prosecuted."

As the property was sold and the proceeds paid over to the appellee without the execution of the bond required by section 440 of the Civil Code, the proceeding is erroneous.

The order applying the proceeds of said attached property to the payment of Sheckler's claim is therefore reversed, and the cause remanded for further proceedings.

Demitz & Hubble, for appellant.

Bar & Goodloe, for appellee.

RICHARD SHALER V. NEWPORT FUEL CO.**Evidence—Book Account—Entries.**

The account books of a company are not competent evidence against a party who was neither a stockholder nor officer in the company at the time the entries were made.

Opinion of the Court.

APPEAL FROM CAMPBELL CIRCUIT COURT.

December 6, 1870.

OPINION BY JUDGE LINDSAY:

The correctness of the judgment appealed from depends upon whether or not the circuit court erred in overruling Shaler's exceptions to the Master's report upon which said judgment is predicated. Exception No. 1 tacitly concedes that the claims due the Fuel Company to the amount of \$1,332.25 were turned over to appellant by his predecessor in office. He failed to turn any part of them over to his successor when he ceased to act as secretary.

There is no proof that all or any part of them were upon insolvent parties, nor that any part of them remained uncollected. Under the circumstances the legal presumption is that they were all collected by him. We think said exception, as well as exceptions No. 3 and 4 were properly overruled.

But we are not satisfied that the charge against appellant for the market value of the 26,108 bushels of coal, which seems to have been unaccounted for by either of the Shalers, is proper.

Said charge cannot be sustained by anything in the record, unless it be admitted that N. S. Shaler turned over to the appellant, when he went into office the quantity of coal assumed by the witness Baughan, viz: 44,660 bushels. There is no evidence to warrant this assumption, except the books kept by said N. S. Shaler while he acted as secretary of the Fuel Company.

These books are not evidence against the appellant, who was neither a stockholder nor officer in said company at the time the entries in said books were made.

It therefore follows that said charge is not proven by competent testimony "and such being the case exception No. 2 should have been sustained."

Judgment then should have been rendered against appellant for such balance as he was shown by the Master's report to be in the arrears of the Fuel company after excluding said item of 26,108 bushels of coal.

Opinion of the Court.

Wherefore the judgment of the circuit court is reversed and the cause remanded with instructions to render judgment in conformity with this opinion.

Hallam, Hawkins & Boden, Webster, for appellant.

O. W. Root, for appellee.

JOHN SMITH v. JOHN P. PELL ET AL.

Trusts—Trustee—Good Faith—Failure of Trust Property to Bring its Value.

Where a trustee acts in good faith, although it seems that he could have realized out of the trust property the full amount of the debt, he will be charged only with the amount actually received.

APPEAL FROM LEWIS CIRCUIT COURT.

April 11, 1871.

OPINION BY JUDGE LINDSAY:

The evidence shows with a reasonable degree of certainty that the debt of Smith was included in the amount of the notes given by Moore to Halbert to secure the judgment for which the mortgage was executed upon the tract of land in West Virginia. We think it may also be safely assumed that at the time Halbert accepted the trust he was apprised of the fact that Smith was one of the beneficiaries.

Halbert, however, was to receive no compensation for his services as trustee, he certainly acted in good faith and though it seems he might have realized out of the mortgaged land the full amounts of all the debts. Yet considering the unsettled condition of the country at the time of the transaction, it must be conceded that he acted in the matter both prudently and discreetly.

He should therefore only be charged with the amount actually received, and as it may be presumed that he paid out the whole amount received to the other creditors and therefore could not have made interest on the amount due Smith, he ought not to be charged with interest until he was notified that Smith had not

Opinion of the Court.

been otherwise paid by Pell, and the amount to which he was entitled demanded. It seems, however, that there is an error in the amount allowed Smith; by the judgment his pro rata of the \$1,300, at the time of its collection by Halbert was \$181.37, instead of \$171.50, as adjudged by the court, and upon this amount we think he is entitled to interest from the 22d of October, 1867, the day upon which Halbert was served with process on the cross petition of Pell.

For the correction of the errors indicated the judgment is reversed. Upon the cross appeal the judgment is affirmed.

Thomas, Phister, for appellant.

Ireland, Throop, for appellees.

JOHN H. STEWART, ETC., v. J. H. NORTON.

Pleadings—Set-Off—Failure to Deny.

There being no denial upon the part of appellants that the set-offs were true they must be taken for confessed.

APPEAL FROM ESTILL CIRCUIT COURT.

April 11, 1871.

OPINION BY JUDGE LINDSAY:

There being no denial upon the part of appellants that the set-offs relied upon by Norton, etc., were true, nor of the execution of the memorandum of settlement by the appellants which the Nortons filed with their answer in support of the same, said set-offs must be taken as confessed. The balance alleged to be due on the notes executed to Temperance and Stewart is admitted to be correct. With these admissions the court could not have rendered a judgment more favorable to appellants than that from which they appeal. The same must therefore be affirmed.

Riddle, for appellants.

Opinion of the Court.

W. J. SANFORD *v.* JOHN H. HALL.**Evidence—Failure to Exclude Objectionable Evidence—Verdict in Accordance With the Weight of Evidence.**

The admission of objectionable evidence, is not of itself sufficient to disturb the verdict of a jury, where the verdict would have been in accordance with the weight of the testimony, if that had been excluded.

APPEAL FROM KENTON CIRCUIT COURT.

January 31, 1871.

OPINION BY JUDGE LINDSAY :

As the jury did not find for Hall on his counter-claim, the instruction on that branch of the case did not injuriously affect appellant's substantial rights.

We do not think that the admission of the objectionable evidence of the witness, McCloud, sufficient of itself to authorize the disturbance of the verdict of the jury. The more especially as we are of the opinion that said verdict would have been in accordance with the weight of the testimony, even if all the evidence of McCloud had been excluded.

Judgment affirmed.

Hallam, for appellant.

Carlisle, for appellee.

L. M. SANDERS, HEIRS, *v.* T. B. SANDERS.**Improvements—Purchaser at Decretal Sale—Permanent Improvements.**

The purchaser at a decretal sale is entitled to pay for permanent improvements put on the land after the confirmation of the sale, to the extent that such improvements enhance the selling value of the land.

Improvements—Purchaser at Decretal Sale—Undivided Interest Sold—Pay for Improvements Must be Proportioned.

Where an undivided interest, only, is sold at decretal sale, the charge for permanent improvements, made after the confirmation of the report, must be proportioned according to interest in the land.

APPEAL FROM BOONE CIRCUIT COURT.

October 17, 1870.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

T. B. Sanders, the purchaser at the decretal sale, is entitled to pay for the permanent improvements put upon the lands, after the confirmation of the sale, to the extent that such improvements enhanced the selling value of the lands. His entrance upon the same can not be regarded as an intrusion, so far as these appellants are concerned and it does not appear that any complaint has been made by the life tenant.

But it seems that the intestate owned, and the court sold only an undivided interest in the tract possessed by the life tenant, and yet the judgment charges this undivided interest with the payment of the whole amount allowed appellee for his improvements, after the deduction on account of the life estate of Mrs. Sanders. This we regard as an error; the heirs of the intestate should only be charged with their proportionate share of allowance, as the improvements inure to the benefit of all the owners of the entire tract. The judgment as to the claim of appellee is therefore reversed and the cause remanded for further proceedings consistent herewith.

Carlisle & O'Hara, for appellants.

Pryor, for appellee.

Z. M. SHERLEY, ETC., v. JOHN M. MARTIN, ETC.**Salvage—Shipwreck—Compensation for Assistance—Steamboat.**

Where a steamboat has been wrecked and set on fire by an explosion of its boilers, any person assisting in extinguishing the flames, thereby saving the property from total loss, is entitled to reasonable salvage.

APPEAL FROM LOUISVILLE CHANCERY.

May 23, 1871.

OPINION BY JUDGE LINDSAY:

The difficulties attending the correct adjudication of this case grew out of the conflicting character of the testimony in detail.

Opinion of the Court.

A careful analysis of the statements of the various witnesses and of the circumstances attending the transaction satisfies us that it is proved with a reasonable degree of certainty.

That the explosion of the boilers of the Steamer General Lytle had the effect of reducing that vessel to a complete and unmanageable wreck.

That as a further result of the said explosion said vessel was set on fire in several places.

That except for assistance rendered by third parties she would in a very short time have been entirely destroyed by said fires.

That most of the officers and a large portion of the crew of said steamer were either killed or disabled by the explosion, and that those who escaped injury were so thoroughly demoralized by the disaster that they could have made no organized effort to extinguish the fires *and save* the boat from total destruction.

That said fires were extinguished and the vessel except in so far as injured by the explosion saved to its owners through the exertions of the officers and men composing the crew of the steamer St. Charles, who rendered to the disabled craft (with the most commendable alacrity and the highest degree of spirit) all possible and necessary assistance.

That the reasonable value of the wreck so saved by the appellees was between ten and twelve thousand dollars, and that the amount adjudged to them in the way of salvage is neither unusual nor excessive. Wherefore the judgment of the Chancellor must be affirmed.

Pope, Bradley & Sumrall, for appellant.

Bruce & Russell, for appellee.

STUART ROBINSON v. CITY OF LOUISVILLE.

Municipal Corporation—Assessment of Agricultural Land for Purpose of Taxation—Taking Private Property Without Compensation.

Although, at the time of the assessment of the real estate of appellant for taxation, it was not within reach of particular city privileges, such as water, gas and regular police protection, and was used for farming, grazing and horticultural purposes only, but these facts alone are not sufficient to exempt the same from taxation for city purposes.

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APPEAL FROM JEFFERSON COURT COMMON PLEAS.

May 25, 1871.

OPINION BY JUDGE LINDSAY:

Although at the time of the assessment of the tax complained of, the real estate of appellant was not within reach of particular city privileges, such as water, gas, and regular police protections. Nor within one one one-fourth miles of a city school, yet it seems from the agreed facts that his premises were skirted on the west by Sixth street leading directly into the heart of the city, and which was then graded and opened for the use of the public. That west of his said premises many lots had been laid out and sold, some of which belonged to appellants, that three lots are conceded to be legitimate subjects of city taxation. "That south of his premises for a distance of more than half a mile lots had been laid out and streets and alleys designated, and although very little building had been done, none of the lots further south had been sold for as much as \$22.00 per front foot. And that appellant himself had laid off out of the eastern portion of his land lots fronting on Third street turnpike and disposed of the same for as much as \$80.00 per front foot."

It is true that appellant's lands are used for farming, grazing and horticultural purposes, and that such as he has retained have not been laid out into lots; but these facts alone are not sufficient to exempt the same from taxation for city purposes. *Arbegust vs. Louisville*, 2d Bush, 271. Considering all the facts presented by the record we are not prepared to decide that the Act of the General Assembly subjecting appellant's real estate to such taxation was a palpable and flagrant abuse of legislative discretion so much so that at first blush it strikes the mind as the taking of private property without compensation, or that it is apparent that the burden was imposed without any view whatever to the interest of the property owner in the objects to be accomplished by its collection and expenditure.

Conceiving that the facts of this case do not bring it within the principle governing the action of this court in the case of *Corington vs. Southgate*, 15th B. Monroe, 330; but that it is similar in all its essential features to the cases of *Cheaney vs.*

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Howes, 9th B. Monroe, 330, and the later case of *Abregust vs. City of Louisville*. We are constrained to concur with the court below in the conclusions reached by that tribunal.

Wherefore its judgment must be affirmed.

Caldwell, Young, for appellant.

Barnett, for appellee.

N. H. SINCLAIR *v.* DAVID BOYLE, ETC.

Municipal Corporation—Street Improvement—Abutting Lot Owner—Contracts—Compliance—Change of Ownership.

As the contractors complied with the contract to improve the street in front of appellant's property, it does not afford any grounds of complaint that the city council did not ascertain the names of the lot owners and the exact fronts of their lots and make the assessment specific in amount against each lot as there was no change in the ownership to this lot since the work was begun.

APPEAL FROM KENTON CIRCUIT COURT.

May 17, 1871.

OPINION BY JUDGE LINDSAY:

The former decision in this cause reported in 6 Bush, 204, settled all the legal questions involved. Appellant, however, upon its return filed an answer raising several material questions of fact necessary now to be noticed.

He insists that much of the work done on Scott street was wholly unnecessary. That the contractor used inferior material in the reconstruction of said street, and that at the time his answer was filed it was not in as good condition as when the work was begun. He denies that the contractor complied with the stipulations of the contract, and says that the street was not kept in repair for twelve months. That the work was over charged for, and that the agreement to keep the street in repair materially increased the cost of the work.

These questions must necessarily be considered together, as each of them is more or less intimately connected with some or all of the others.

It is evident that the three witnesses best qualified by experience in such matters and by actual acquaintance with the

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work done, and the condition of the street before and after the same was done, to speak advisedly as to the several questions in issue, are the city engineer, the chairman of the street committee, and the witness, Yates. That there are slight discrepancies in the statements of these witnesses does not in the least detract from the weight to which their general testimony is entitled, especially in view of the fact that their evidence does not conflict in a material degree with that of the other witnesses.

We are of opinion that when all the testimony in the case is considered it establishes by a decided preponderance, that the work done on the square on which appellant's lot is situated was necessary. That the material used, and the manner in which the work was done conformed substantially to the requirements of the contract. We are further of opinion that the evidence failed to show that any portion of Scott street on the square in question required repairs within twelve months after its completion on account of any defective work done by the contractor, or that the appellant was overcharged. Or that the stipulation that the work should be kept in repair for twelve months increased the assessment against appellant's property. In fact from the testimony of the street engineer, such can not possibly have been the case.

Nor do we think it affords any ground of complaint to appellant that the city council did not ascertain the names of the lot owners and the exact fronts of their lots, and make the assessment specific in amount against each lot. It seems there has been no change in the ownership of his lot since the work was begun. He does not deny that he is now, and was at the time the suit was commenced the real owner of the lot of ground adjudged to be sold. If this admitted allegation be true, then the purchaser at the decretal sale, will acquire a perfect title under his purchase.

If it is not true, and appellant does not own the lot, then he is not prejudiced by the judgment.

Failing to perceive that the rights of appellant have been substantially prejudiced by the judgment complained of, the same must be affirmed.

Menzies & Furber, for appellant.

Fisks, for appellees.

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JAS. H. ROBERTS, ETC., v. D. R. MCKINNEY & BROS.

Vendor and Purchaser—Action to Recover Purchase Money—Fraud and Misrepresentation as to Boundaries and Hostile Claims—Sufficiency of Allegations in Answer—Demurrer.

Appellants in their answer, state that pending the treaty for the sale of the property, appellees fraudulently misrepresented to them the boundaries of the land and fraudulently concealed from them, that there was a hostile title and rival claim to fully one-third of the most valuable part of the lands, but they say they were not sufficiently advised then, to state whether the pretended or asserted claim to the land is valid or not; that they had been informed that it was not; but that the Red River Iron Manufacturing Company makes claim to a part of said land, which is to that extent a cloud upon their title and detrimental to them, which appellees fraudulently concealed from them and thereby induced them to make a contract which they would not have otherwise done, and they are informed that there are large outstanding liens upon the land which is superior to that of plaintiffs. They say that if they ever accepted the deed from appellee's it was done by mistake on their part, as to its purport and it contains exceptions that they did not fully understand.

Held, that in such a case it is well settled by numerous authorities in this state, that unless the vendee has been deceived and induced by the fraud of the vendor to accept the title he must pay the consideration.

Pleadings—Amended Answer Containing Matters of Defense Set up in Former Suit Between Same Parts and Involving Same Issues, is no Bar.

The appellees alleged in their petition that in April, 1870, a suit was pending, in the court below, in which they were plaintiffs and appellants were defendants in which the sufficiency to the title to the land and the quantity contained in the tract were directly in issue and that a consent judgment was rendered by which the appellants withdrew so much of their answer as set up a defect of title and deficit in quantity and to accept the deed then tendered them and that said deed was thereupon delivered to and accepted by them and these allegations are not controverted by the answer in this suit. But they allege in their amended answer, that if the deed was accepted by them, it was done by mistake, as to its purport, on their part and that the deed contains exceptions which were not fully understood.

Held, that the answer was insufficient and presented no bar to this action, and as the matter set up in the amended answer were being litigated between the same parties in another suit in the same court, the judge did not err in refusing to permit it to be filed.

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APPEAL FROM ESTILL CIRCUIT COURT.

May 8, 1871.

OPINION BY JUDGE PETERS:

Appellees sold to appellants the property in Estill county known as the Cottage Furnace property at the price of \$30,700, payable in instalments evidenced by notes, one of which matured on the 15th of April, 1870, for \$6,000, and this suit in equity was brought in August, 1870, to coerce its payment by an enforcement of their asserted lien as vendors.

In the petition after alleging the maturity and non-payment of the note sued on appellees allege that at the April term, 1870, of said court, they had a suit pending against appellants in which the title and the boundary of the Cottage Furnace property were involved, and by an agreement of the parties, an order was entered of record in that suit that the defendants, now appellants, should withdraw their defense so far as the quantity and title to the lands attached to said Cottage Furnace were called in question by their answer, and agreed to, and did accept a deed then made and delivered to them by appellees, properly acknowledged, and that it had been recorded in the proper office, and they make a copy of the consent judgment aforesaid a part of their petition, from which it appears that appellants withdrew so much of their answer, counter-claim, and cross-petition as set up, and relied on any defect in appellees' title, and so much as sought compensation for any deficiency in the quantity of land sold, and accepted the deed for the property then tendered.

The residue of the judgment is not material to this controversy, and need not be recited.

The appellants in their answer, after admitting the note sued on was given for one of the instalments for the property named in the petition, state that *pending the treaty for the sale of the property*, appellees fraudulently misrepresented to them the boundaries of the land, and fraudulently concealed from them, that there was a hostile, and rival claim to fully one-third of the most valuable part of the land; but they say that they were not sufficiently advised *then* to state whether the pretended, or asserted claim to the land is valid or not; that they had been informed

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that it was not. But that the Red River Iron Manufacturing Company makes claim to a part of said land, which is to that extent a cloud upon the estate, and detrimental to them, which appellees fraudulently concealed from them, and thereby induced them to make a contract which they would not otherwise have done.

That during the treaty for the sale appellees fraudulently represented that they owned mining privileges for five miles from the stack of the Cottage Furnace, which privileges would pass to them by the purchase of the furnace, which were great inducements to them to make the trade, but that the Red River Iron Manufacturing Company are now harrassing them with law law suits to prevent them from mining where appellees represented they would be entitled to mine and cut wood under their purchase of said property from them.

They further state that appellees made them a deed for the land on the 15th of April, 1870, in which they warranted the title to be good, but that the warranty was broken by the claim set up by the Red River Iron Manufacturing Company, which claims (they say) they do not assert are valid, but that they have been damaged greatly by them; that they could have sold the property for an advance on the original cost, but that purchasers have been deterred by the claims of said company from purchasing their property, other injurious effects resulting from this claim are elaborated, but as they are not deemed material they will not be recited.

As a further defense they say they are *informed* that there are large outstanding liens upon the land held by Pierce, Ginter & Vaughn to the amount of about \$10,000 superior in equity to that of plaintiffs, and if they are compelled to pay the debt sued on, and this prior lien be not removed, their property may be subjected to the payment of that debt also.

In answer to the allegation that appellees had made and delivered a deed for the property, to appellants which they accepted, they say if it ever was accepted by them, it was done by mistake on their part as to its purport; that it contains exceptions which they did not fully understand, and which appellees did not intend to make. That was interlined after it had been acknowledged, and was thereby vitiated; that the interlineations

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are so frequent, and to such an extent that it is difficult to tell what it does convey and what it warrants.

They plead that they had paid \$1,200 on the debt, and ask a credit for the same, and claiming damages for what they denominate fraudulent concealments, misrepresentations, and breaches of warranty on the part of appellees; they plead them by way of counter-claim and pray for a judgment for \$5,000.

To the answer a demurrer was filed by appellees.

On hearing the court adjudged that the answer presented a partial defense so far as payment of a part of the debt before the suit was brought was relied upon, but as to the residue it presented no defense. Appellants then offered to file an amended answer, to which appellee objected on the ground that the same causes of action pleaded in said amended answer by way of counter-claim, were pleaded in a suit then pending in said court in which appellees were plaintiffs, and appellants were defendants, which appellants admitted to be true, and the court refused to permit the amended answer to be filed, to which appellants excepted and failing to make any further defense judgment was rendered against them, and they have appealed.

The first important question for consideration is to the facts stated in the original answer constitute a bar to the whole action.

The uncontroverted allegations of the petition show that possession of the estate has been delivered, the contract executed, the conveyance with warranty of title made and accepted by appellants, and they do not allege that they have been evicted, nor that appellees are insolvent, or non-residents.

In such a case it is well settled by numerous authorities in this State that unless the vendee has been deceived, and induced by the fraud of the vendor to accept the title, he must pay the consideration, or price of the land. *Vance vs. House's Heirs*, 5 B. M. 537; *Simpson and Others vs. Hawkins & Cochran*, 1 Dana 308; *Rankins & Co. vs. Timberlake*, 6 Mon. 225; *Payne vs. Cabell*, 7 Mon. 198.

This conclusion leads necessarily to an examination of the facts stated in the answer to ascertain whether they are sufficient to defeat the action, or to authorize the relief sought by the counter-claim on account of fraud.

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In determining this question it is proper to understand the precise state of the pleading in reference to it. Appellees in their petition allege that in April, 1870, a suit was pending in the court below in which they were plaintiffs, and appellants, defendants in which the sufficiency of the title to the land, and the quantity contained in the tract were directly involved, and at the April term of the last named year of said court a consent judgment was rendered, by which appellants withdraw so much of their answer and counter-claim as set up a defect of title to and deficit in the quantity of land and to accept the deed then tendered to them, and filed in the suit, and that said deed was thereupon delivered to, and accepted by them, and a copy of said judgment was filed, from which the facts appear as alleged, and they are not controverted by the answer. They say if it ever was excepted by them, it was done by mistake as to its purport on their part, that the deed contains exceptions which were not fully understood, and which the plaintiffs did not intend to make, as they are informed and charge. That they knew as much about the title, and the boundary of the land when they consented to the judgment referred to, and accepted the deed as they did when they filed their answer in this case can not be doubted. They do not allege that they had made and discovery of facts since they accepted the deed, nor do they charge any fraud on the part of appellees at the time the consent judgment was rendered, or when they accepted the deed; but all the allegations of fraud refer to the time when they were negotiating about the sale and purchase of the property; and consisted in misrepresenting their title to the land, and the boundary of the tract which were satisfactorily adjusted when the deed was accepted as we must assume. And even if that assumption is not authorized, the consent judgment will bar them of any relief for the same matters of defense set up and adjudged in that case until it is set aside, or reversed. And as to the mistake alleged, if they did not understand the purport of the deed it must have been their own fault, since no fact is stated which can be construed to impart any wrong to appellees.

It results from the foregoing that the answer except so far as a partial payment of the debt was pleaded was insufficient, and presented no bar to the action, and as the matters set up in the

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amended answer were being litigated between the same parties in another suit in that court, the judge did not err in refusing to permit it to be filed.

But there is an error in the final judgment prejudicial to appellants for which there must be a reversal. After stating that the matters set up in the answer are insufficient to constitute a defense to the action except as to the \$1,200, pleaded as partial payment, the court proceeds to render judgment for \$6,000, the full amount of the note sued on with interest from the date of its maturity, and after ordering land to be sold to pay the debt interest and costs including the commissioner's allowance for selling, and prescribing the terms and manner of making the sale, adds these words: "The commissioner will report his proceedings under this judgment to the next term of this court for its approval, and the cause, including the twelve hundred dollars excepted out of this judgment, is continued until the next term of this court." The judgment is rendered for the whole \$6,000, and nothing said of any exception therefrom until the clause for the continuance is reached, and then the language is that the case, *including the twelve hundred dollars excepted, etc.*, is continued. According to the terms and meaning of the judgment it must be for the whole \$6,000. The commissioner is required to sell for that sum and no less, and having embraced the \$1,200 the bonds of the purchaser must secure that sum as well as the residue of the debt and the continuance of the cause would be only to receive, and adjudicate on the Master's report. Indeed, it may be very seriously doubted whether the court at a subsequent term would have any power to try the issue as to the payment of \$1,200. He should have rendered judgment for \$4,800, the amount not controverted by the answer and continued the cause to try the issue as to the payment of the \$1,200. Wherefore the judgment is reversed and the cause is remanded to render judgment and for further proceedings consistent herewith.

Turner, Caperton, Chenault, for appellant.

Riddle, for appellee.

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WM. RICHARDS v. JOHN C. WHITLOCK & McNICHOL.

Pleadings—Agreement to Abandon Appeal is Void.

Appellant was sued by appellees and he plead as a defense, that he had a right to retain the proceeds of the property sued for under and by a contract with appellees by which they agreed that if he would abandon the prosecution of an appeal from a judgment by which his property was confiscated, that they would make good an agreed proportion of his loss by reason of said judgment, which plea is void.

APPEAL FROM TRIGG CIRCUIT COURT.

January 11, 1871.

OPINION BY JUDGE LINDSAY:

Richards, who was sued by Whitlock & McNichol for a balance of the net proceeds of three hogshead of tobacco, sold by him in New York, and which the appellees claimed were their property, plead that he had a right to retain the same under and by virtue of a contract with said Whitlock & McNichol by which they agreed that if he would abandon the prosecution of an appeal from the judgment of the United States District Court for the District of Indiana, by which judgment two hogsheads of tobacco, the property of Richards, were confiscated, that they would make good an agreed proportion of his loss by reason of said judgment of confiscation.

Upon the trial all the evidence offered by Richards in support of his void plea was admitted by the court, and the instructions given to the jury at his instance were fully as favorable to him as the law and facts would admit.

But one instruction was given at the instance of Whitlock & McNichol and that was unobjectionable.

The specific objections to the certificates of the depositions taken and read by appellees are not pointed out. From a careful examination of said certificates, we conclude that whilst they are informal, they substantially comply with the requisitions of the code of practice.

The record shows that certain portions of said depositions deemed irrelevant or incompetent as testimony were not permitted to be read to the jury. As the bill of exceptions fail to

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show what portions were read we must presume that the court excluded all improper matter from the jury.

The testimony of the witness who spoke of the premium on gold could not have been prejudicial to the appellant even though it may have been improperly permitted to go to the jury.

As there was no available error in the action of the court upon the trial, we are of opinion that the finding of the jury is not so flagrantly against the weight of evidence as to warrant the interference of this court.

Judgment affirmed.

Dulaney, Barnett, for appellant.

NORTON STRUNK AND OTHERS *v.* DANIEL DULTON AND WIFE.**Wills—Testimentary Capacity.**

On account of the testator's extreme age his mental faculties were considerably impaired and he exhibited evidences of a disordered intellect. But on the day of the execution of his will he was sufficiently in possession of his intellectual powers to dictate the provisions of the instrument and sufficiently self possessed to investigate and understand its contents.

APPEAL FROM PULASKI CIRCUIT COURT.

April 28, 1871.

OPINION BY JUDGE LINDSAY:

There is no evidence in this record showing that David Dulton was induced to make the will being contested by reason of undue influence exercised over him by the appellees or their family, nor do we think the circumstances connected with the transaction tend to establish any such conclusion.

The testimony as to the capacity of the testator is conflicting. It seems pretty clear that on account of his extreme age his mental faculties were considerably impaired, and that when conversing upon certain subjects he exhibited evidence of a disordered intellect, and the witnesses generally agree that he was not capable of transacting or attending to business. Still we do not regard the testimony as prepondering in favor of the con-

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clusion that at the time the will was made, he did not possess sufficient mental capacity to decide as to what was a proper disposition to be made of his estate.

From the testimony of the draftsman of the paper and of the subscribing witnesses thereto, it is evident that on the day of its execution he was sufficiently in possession of his intellectual powers to dictate the provisions of his will, and sufficiently self-possessed to investigate and understand its contents. Nor do we think the paper upon its face presents intrinsic evidence of want of testamentary capacity upon the part of the testator. It is probable in view of the condition of some of his daughters and grandchildren that a more equitable disposition of his property would have been made, but the will as made is neither irrational nor inexplicable. It seems that ten years prior to the time it was made, and when his mind was unclouded, he had indicated his intention to give all his property to his son, Daniel, and his wife, and that he gave a reason for such intention which if not satisfactory, was certainly a sensible one.

This reason continued to exist up to the time his will was made and doubtless continued to exert a controlling influence over his mind, considering all the evidence in the case, we are not prepared to disturb the action of the courts below.

Judgment affirmed.

James, for appellant.

G. REXINGER v. LOEB & BLOOM.

Attachment—Order Delivered to Sheriff—Priority of Liens.

When an order of attachment is sued out and delivered to the sheriff a lien is thereby created on the property of the defendant, prior and superior to one subsequently issued, although the sheriff levies the last one first.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

April 20, 1871.

OPINION BY JUDGE LINDSAY:

The order of attachment sued out by Loeb & Bloom bound the stock of groceries in the hands of Littlefield from the time

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of its delivery to the sheriff, and the lien thereby created would have been made perfect and complete had the sheriff executed said order upon said property.

In his original return on the order the sheriff makes no mention of the stock of groceries whatever, and in his amended return he merely states that after the lien of Rexinger had been made complete by the levy of the attachment sued out by him, that his "Intention was to levy the attachment of Loeb & Bloom upon said groceries subject, however, to the attachments of Rexinger, but failed to endorse the same, which I now endorse." It is a matter of some doubt from this language whether the intention of the sheriff to make the levy was ever carried out, but if it was, still it is clear he made the same subject to the levy previously made under the attachment of Rexinger. Whether or not the sheriff had the right to require from Loeb & Bloom a bond of indemnity it is unnecessary to decide in the determination of the questions arising upon this appeal.

It is certain that the lien of Rexinger upon the groceries was made complete, before that of Loeb & Bloom, (Civil Code, section 263), consequently the proceeds of the sale of the same should have been first applied to the payment of his claim.

For the error of the court in postponing the payment of appellant's debts until that of appellee was satisfied out of the proceeds of the groceries the judgment appealed from must be reversed.

The cause is remanded for further proceedings consistent herewith.

Bush & Bush, for appellant.

J. M. ROBERTS AND OTHERS *v.* ISAAC MALONE AND OTHERS.

Judgment—Suit to Settle Estate—Commissioner's Report Confirmed—Injunction Dissolved—Money in Hands by Executor Adjudged to Him—Final Judgment.

A judgment confirming a commissioner's report of settlement with an executor, dissolving an injunction granted in the case and adjudging the money in the hands of the executor to belong to him, is final and confers upon the Court of Appeal jurisdiction to review it.

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APPEAL FROM BARREN CIRCUIT COURT.

May 17, 1871.

OPINION BY JUDGE PETERS:

This suit in equity was brought February, 1860, by appellants, the widow and heirs of William H. Malone, deceased, against appellees, by which appellants seek a settlement with Isaac Malone as administrator of W. H. Malone, deceased, and also the executors of Samuel Malone, deceased, who was father of said intestate, William H. and the said Isaac Malone.

After setting out in detail the estate of W. H. Malone, deceased, which came to the hands of his administrator, including that which he was entitled to under the will of his father, aggregating five thousand dollars, appellants allege that said amount was composed in part of two notes held by their intestate, on said appellee, Isaac, one for \$375 and the other for \$1,300, executed for part of the consideration for a tract of land sold by intestate to said appellee, both due and unpaid, and were taken into possession by him on the death of intestate, but that he had not placed them on the invoice returned by him, nor accounted for them in any other way. That he was further indebted to decedent when he died in the sum of \$600, the price of a negro man named Sam, also in one hundred dollars for a wagon purchased of decedent, all of which the administrator had failed to return upon an inventory or account for; that the personal estate of decedent if properly, and legally administered, was ample to have paid all his debts, with the cost of administration, and leave the slaves Louisa and her infant child, and Roland, Emily and Amanda for his widow and children; but that the administrator had sold, or was attempting to sell said slaves to A. R. Forest to pay the individual debts of the administrator and to indemnify said Forest for liabilities which he had incurred for said Isaac, and for which he knew the estate of intestate was not responsible; and that he was fraudulently combining with said Isaac Malone to convert said negroes to their own use; that they were family negroes given to the widow of intestate by her father before the death of her husband; that a sale of them was not necessary to pay his debts; but that Forest was endeavoring to get them, and to take them south.

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Appellants allege that the father of their intestate died before he did, possessed of a large estate, a considerable portion of which he devised to him, all of which went into the hands of appellee as his executor, and they call upon him to set forth the estate, real and personal of said testator, the value thereof, and the amount of estate that their intestate took under the will of his father, for all which they pray that said appellee may account, and for the unpaid price of the land, slave and wagon purchased of intestate, and a full and complete settlement of his account. They allege that his property had been attached by his creditors; that he was insolvent, and therefore prayed for, and obtained an injunction to inhibit him from selling, and taking said slaves until he shall have settled all his accounts as administrator of their intestate, and as executor of his father.

In his answer, appellee, Isaac Malone, states that on the 9th of December, 1858, he made a settlement of his accounts as executor of the estate of his father with the proper officer which settlement had been returned to the Barren County Court, which court had granted him his letters testamentary, and that said settlement was approved and confirmed by said court, without exception, and was correct, and it showed that he then had of the estate of said testator in his hands the sum of \$3,560.11, to which was to be added the sum of \$2,745, money received by him since said settlement for land sold of said testator, from which he claims several credits should be allowed him amounting in all to about \$459.13, two hundred of which he claims for his services, and if the whole of said credits should be allowed, then there would be a balance of \$5,845.98, to be divided as he says into eight parts and distributed amongst the devisees of the testator of whom W. H. Malone was one and for whose distributable share he admits he is accountable, but he says said testator directed in his will that his devisees were to account for advancements made to them in his life time, and he was not then prepared to state what would be the precise amount chargeable to him as administrator as aforesaid from that source; besides, he apprehended that a debt of about \$200 would have to be paid which was outstanding against his father's estate, which would reduce the estate that amount.

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That from the distributable share of W. H. Malone should be deducted the sum of \$214.85, the amount of purchase made by him on the 18th of November, at the sale of the estate of testator and for which he gave no note, nor did he ever pay the same.

Of the estate of Wm. H. Malone, he says he caused a true and correct appraisement and sale bill to be made and returned, except as to the negroes; that of the accounts due Neal and intestate resulting from a partnership between them in carrying on a blacksmith's shop on a settlement with Neal he received \$113.80, and on accounts on various persons he had received \$175.87, and that except the sale bill he says he is chargeable with amount of cash notes, \$182.57, on account of partnership with Neal, \$103.80, and other accounts of \$186.87.

Appellee admits he bought the slave and wagon at the prices set forth in the petition on the 23d of August, 1854, but says he paid for them the same day he made the purchase, having gotten the money from two, Ellers and Huffaker, which they owed him for land and says he took a bill of sale for the negro, which he professes to file, but which is not found in the transcript before us.

He also admits the execution of the two notes for the land as charged in the petition, and says he exhibited them to the appraisers of the estate to be entered upon the inventory; that they had credits put on them by intestate for large amounts paid and he at the time explained to the appraisers that his brother, the intestate, had directed him to make payments to certain of his creditors, and for all payments thus made he would allow him credits; that he did pay to various persons debts of said intestate by his direction in amount equal to the principal and interest on said notes, and others were not, but were admitted by his brother; and they had agreed to meet and settle up the matter, where the notes were to have been delivered up to him, but his brother died before this agreement could be carried out, and upon an examination of the notes and of the list of payments made on them, the appraisers declined to enter them on the inventory and they were not entered. That they had been fully paid off, by paying debts of his intestate and by his directions to persons, a list of whose names with the amount paid to each he proposes to file with his answer.

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He assigns as a reason for not filing the notes themselves, that he had bought a suit for the conveyance of the land for which the notes were given against appellants and was advised by his attorneys, Bates and Smith at Glasglow, that it was necessary for them to have said notes to file in said suit; that he put the notes in a sealed letter directed to said attorneys, and placed the letter containing them in the post office, but they never received the letter, nor notes as they informed him, and they are lost, and he is therefore unable to file them in this suit. He states he had sold a slave belonging to the estate of intestate for whose price he is charged on the sale bill, and that it was necessary to have sold those named in the petition to pay the debts of intestate, which he would have accomplished if he had not been presented by appellants. He denies all the charges of fraudulent combination with Forest to sell said slaves to pay his individual debts, or to secure Forest for liability incurred for him, and charges that he had paid of his debts outstanding against the intestate about \$6,000, while the assets excepts the slaves named in the petition which came to his hands amounted to \$2,142.78, and there were other debts still outstanding. He finally makes his answer a cross-petition against appellants and prays for a sale of their interest in some estate specified in which they have an interest after the death of the widow of the testator, Samuel Malone, and the proceeds applied to pay him.

Forest filed an answer in which he denies all fraud, and fraudulent combinations with Isaac Malone, says the latter had paid debts of intestate to the amount of \$3,000 over and above the assets which came to his hand, the greater part of said sum he borrowed, and said Forest was his surety and the balance he loaned him, and in order to enable said administrator to pay him another from whom he had borrowed the money, he (Forest) purchased said slaves from him at the price of \$3,000, but was prevented from reducing them to possession, and perfecting his contract by appellants whereby the price of the slaves was lost to the estate, and that appellants are responsible for the said sum to the creditors of said intestate, or to his administrator, who had paid their debts.

The case, after the pleadings were completed, was referred to the master to audit and state the accounts of appellee, Isaac

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Malone, as executor of Samuel P. Malone, and also as administrator of W. H. Malone, who, on the 16th of March, 1866, filed reports in both cases, each of these reports was confirmed, and the court then adjudged that the administrator had paid out on debts against the estate of his intestate, \$2,702.72 more than the assets which came to his hands amounted to, and that there were other debts against the estate amounting to \$365.95, which rendered it manifestly necessary that the administrator should have sold the negroes, and that the injunction prohibiting him therefrom was wrongfully granted, and was then dissolved; and it is said in the opinion of the judge that Isaac Malone and other creditors are entitled to their remedy on the injunction bond.

The commissioner, in his settlement of the estate of Samuel P. Malone, finds in the hands of the executor, \$411.86, due to the estate of Wm. H. Malone, which he adjudges to Isaac Malone, having first charged his intestate with \$214.85, amount purchased at the sale of the personal property of Samuel P. Malone, which certainly was a proper charge if the evidence sustained it. But the proof is not in this record of the judgments thus rendered and the heirs and widow of Wm. H. Malone complain.

But it is insisted by appellees that the judgments are not final and this court has no jurisdiction. In this view we do not concur. The balance reported by the master in favor of appellee is in effect adjudged to him. The injunction is dissolved, and the money in his hands as executor of his father and which would be due to the estate of his intestate is not only adjudged to him but is finally disposed of to one of his creditors. We do not doubt therefore that the judgment is final, and we are satisfied that it is erroneous and prejudicial to appellants.

Appellee, Isaac Malone, admits that he was indebted to the intestate for the slave, Sam, \$600, for a wagon, \$100, and in the sum of \$1,675 evidenced by two notes, but alleges he had paid them, and in his answer says he has the bill of sale for the negro, and a list of debts paid off by him for intestate in his lifetime equal or greater in amount than the total of those debts, but he neither filed the bill of sale, nor the list of debts paid. In making his report the master failed to charge the administrator with those claims as he manifestly should have done, and then credit him by all payments which he showed himself entitled to.

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Furthermore, it is by no means certain and we are inclined to think that said appellee should be charged with \$500, which he admitted to Twyman which W. H. Malone had placed in his hands with which to pay off some of his debts; that, however, we leave open for appellee to explain if he can and he certainly should be charged with fifty dollars for the rent of the blacksmith shop for the year 1857.

And the part of Samuel P. Malone's estate not finally disposed of should be wound up by selling the realty if any he left, and Wm. Malone's part ascertained and applied to the payment of any debts outstanding as far as it will go.

For these reasons the judgment is *reversed* and the cause remanded with directions to recommit it to the master and further proceedings consistent herewith.

Dehoney, Harlan, Newman, for appellant.

James, Garnett, for appellee.

M. C. SIM, ETC., v. SAMUEL WAGGONER, ETC.

Deeds—Self-Contradicting Certificate of Acknowledgment—Construction—Surplusage.

The grantor being the owner of the land in fee sold the same to her grantee for a valuable and full consideration, and by a deed executed jointly with her husband conveyed the same, with covenants of general warranty, and the certificate of acknowledgment recites that she appeared before the commissioner of deeds and severally acknowledged that she executed the same as her free act and deed for the uses and purposes therein expressed. She was examined separately and apart from her husband and the contents and effect of the deed explained to her, and she freely acknowledged same, with the intention thereby to renounce, give up and quit claim her two-thirds and right of dower in the estate.

Held, that the concluding sentence in the certificate is inconsistent and irreconcilable with the residue thereof, and is mere surplusage, as it does not apply to any estate held by the grantor, and should, therefore, be disregarded.

APPEAL FROM PENDLETON CIRCUIT COURT.

April 6, 1871.

Opinion of the Court.

OPINION BY JUDGE PETERS:

Mrs. Charlott Waggoner, wife of Samuel Waggoner, of the city of New York, being the owner in fee of a tract of land of about 268 acres in the county of Pendleton, Kentucky, sold the same to Mrs. Mary C. Martin for a valuable and full consideration in June, 1860, and by a deed executed jointly with her husband, conveyed the same to her vendee; which deed was acknowledged before R. A. Watkinson, commissioner in the City of New York appointed by the governor of Kentucky to take the acknowledgment of deeds, etc. Who, after stating that fact, certifies that the grantors, who were personally known to him to be the same individuals named in the instrument, appeared before him on the 11th of June, 1860, and severally acknowledged that they executed the same as their free act, and deed, for the uses and purposes therein expressed, and wished it certified, and recorded as such, and that the said Charlott Waggoner being examined by him privily and apart from, and out of the presence of her husband, and the contents, and effect of said instrument being by him fully explained to her, she did then and there acknowledge to him that she executed, sealed and delivered the same for the uses and purposes therein mentioned freely, and without any fear, compulsion, or undue influence of, or from her said husband or anyone with the intention thereby to renounce, give up, and quit claim her *two-thirds* and right of dower of, and in said estate, and that she was satisfied therewith, and did not wish to retract the same.

Whether the deed, with the acknowledgment of Mrs. Waggoner thus certified is sufficient to invest Mrs. Martin, her vendee, with an indefeasible title to the land is the only question involved in the controversy.

Mrs. Waggoner is named in the premises as a grantor, recites the consideration as having been paid, which appears to be the full value of the land, grants the fee by the terms of the deed, and warrants the title to her vendee; and the only difficulty in the case arises from the last paragraph, or sentence of the elaborate and self-contradicting certificate of acknowledgment of the commissioner heretofore substantially recited. The purposes of the deed as therein clearly expressed, were to in-

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vest Mrs. Martin with the absolute title to the land, that Mrs. Waggoner, as the commissioner certifies in a previous part of his certificate, on privy examination, after its contents and effect were explained to her by him, acknowledged the deed. In her derivation of title is recited, and it there appears that she owned the fee simple estate in the land, and had no dower interest whatever, this she knew, for in the deed she declares she is lawfully seized of the land, and in the *habendum*, stipulates that Mrs. Martin, her heirs and assigns are to have and to hold the same forever. So that there is no expressed intention either in the deed or certificate proceeding the last sentence on the part of Mrs. Waggoner to renounce her two-thirds, and right of dower "in said land," on the contrary the existence of any such intention is repealed by the contents of the deed, and certificate and by the nature of the transaction.

The commissioner does not certify that Mrs. Waggoner *declared* at the time that such was her intention, but it seems to be rather his conclusion of her intention.

The concluding sentence of the certificate is inconsistent and irreconcilable with the residue thereof, and to give it the effect contended for would be to defeat the manifest intention of the grantors, and the purposes of the grant. It is mere surplusage, as it does not apply to any estate held by Mrs. Waggoner, and should therefore be disregarded. Wherefore the judgment is *reversed*, and the cause is remanded with directions to overrule the demurrer to the petition and for further proceedings consistent herewith.

Ireland & Deadrick, for appellant.

Lee, for appellee.

EMILY SLOAN v. F. P. STONE, ETC.

Wills—Devise to Wife to Use, Control and Possess—In Order to Raise and Educate Children—Advancements to Be Made—Life Estate—Construction.

"I will and bequeath the residue of my estate to my wife, to be used, controlled, managed and possessed by her, in order that she may be able to raise and educate our infant children. If any of our children shall become of lawful age and need some assistance during

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the time that my wife retains all the estate, I want her to afford them such assistance as she may be able to do without inconvenience to herself, provided my wife shall at any time see proper to marry, then, in that case, my will is that she shall have one lawful third of my estate during her natural life, and after her death returned to my children."

Held, that the wife took a life estate only.

Wills—Control and Use Does Not Invest Individual With Vendible Estate—Gift for the Benefit of Others at Disposal of Donor—Equity Will Declare Trust—Wants and Desires Imperative.

The right to use, control and manage property is not enough to invest the individual with a vendible estate therein, nor to give the right to pledge or charge such property for the payment of donor's debts.

If a gift in a will is expressed to be for the benefit of another or to be at the disposal of the donee for herself and children, or towards her support and her family, equity will declare the trust and see that it is faithfully executed.

The term "want," which was used doubtless by the testator as synonymous with wish, is undoubtedly as imperative as the term desire, yet this word, when used in wills, is sufficient to indicate the intentions of the testator.

APPEAL FROM SPENCER CIRCUIT COURT.

April 28, 1871.

OPINION BY JUDGE LINDSAY:

The second item of the will of Edmond Sloan, deceased, is in these words: "I will and bequeath the residue of my estate both personal and real, that I now have, or have in expentency, to my wife Emily Sloan to be used, controlled, managed and possessed by her so long as she shall remain my widow. In order that she may be enabled to raise and educate our infant children. If any of our children shall become of lawful age and need some assistance during the time that my wife retains all the estate, I want her to afford them such assistance as she may be enabled to do without inconvenience to herself, provided my wife shall at any time see proper to marry, then in that case my will is that she shall have one lawful third of my estate during her natural life and after her death return to my children, and that the remainder be appropriated to the benefit of my children so as to make them as nearly equal as possible,

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charging those that have received advancements with the amount received." The third item provides that if any of his slaves shall become disorderly or disobedient they shall be sold by his executors and the proceeds appropriated for the benefit of his estate in such manner as his said executors may deem most advantageous.

It is insisted by the appellees who are judgment creditors of Mrs. Emily Sloan that she takes under this will a life estate in all the real property devised by her deceased husband and an absolute title to the personality, and that such estate can be legally subjected to the payment of their judgment, by levy and sale under execution. It seems evident that the testator desired that out of his estate his infant children should be reared and educated, and that whilst he was willing and anxious that his wife, so long as she remained his widow, should *use control, manage and possess* his entire property, still he wished her to advance to his children as they become of age as much as she could do without inconvenience to herself. It is further to be observed that although he entrusted the *control and management* of the property to his wife, he yet provides that in case it shall become necessary that a portion thereof shall be sold, that this duty shall be performed by his executioners." The right to use control and manage property is not enough of itself to invest the individual with a vendible estate therein, nor to give the right to pledge or charge such property for the payment of individual debts. The devise to Mrs. Sloan is qualified by these restrictive words, in the same sentence, and the reasons for the imposition of such restrictions are clearly and explicitly stated. It cannot be assumed that the testator intended by his will totally to disinherit his children during the life of his wife, in case she chose to remain a widow, yet such would be the legal effect of the construction insisted upon by the appellees.

To this it may be answered *that* that the testator's children were likewise the children of his sole devisee, and that he had confidence that her maternal affection would assure the faithful performance of his solemnly expressed wishes.

But if she has the power under the will to charge the estate for the payment of her individual debts, she by imprudent business transactions, although animated by the purest motives,

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could have impoverished herself and reduced the infant children of her husband to absolute want—within a year or two after his death.

Again if the will is to be construed according to mere grammatical or technical rules of construction, if the wife took an estate of any kind in the property devised it was not a mere life estate but an estate in fee simple upon condition that she does not marry the second time, the proviso to the bequest to the wife is that in case she shall see proper to marry, she shall then take only one third of the estate for life with remainder over to the children. If she does not marry the proviso does not apply, and her estate becomes absolute notwithstanding the manifest intention of the testator to the contrary.

These difficulties are escaped by accepting what appears from the face of the will itself to have been the intention of the husband. Permit the wife to be as he intended the trustees of his estate with the right to use, control, manage and possess it for the purpose indicated by him so long as she remained a widow and in case she again marries let the trust cease, and let the estate be divided between her and her husband's children in the manner prescribed by law in cases of intestacy. Such a construction not only effectuates what must have been the intention of the testator, but is sustained both by reason and authority.

In the case of *Milner vs. Calvert*, 1st Metcalfe 474, the devise was to the wife to use as she thought best during her life time and should there be a surplus above her support, it was to be used by the executors of the will to the best advantage for the testator's children. It was held that the annual surplus was to be received and held by the executors. In this case the children are to be advanced after arriving at age, by the devisee in such amounts as she can spare without inconvenience to herself. These amounts can only be ascertained by permitting her to retain possession of the estate. Again, "if a gift in a will is expressed to be *for the benefit* of others, or to be at the disposal of the donee for herself and children, or *towards* her support and her family" equity will declare the trust and see that it is faithfully executed, it is only necessary that the fiduciary words be imperative and not leave it discretionary with the devisee to do

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or not to do the thing indicated or desired, "Tiffany and Bullard, on Trusts, 18 & 19."

In this case the property is to be used, etc., in order to enable the devisee to rear and educate the children of the testator, and when this is done "*wants*" or desires her to give them such assistance as she can without inconvenience to herself. The term "*want*" which was doubtless used by the testator as synonymous with wish is undoubtedly as imperative as the term "*desire*," yet this word when used in wills is sufficient to indicate the intention of the testator either to pass an estate in fee, or to abridge or limit an estate for life. In the will under consideration it has when considered in connection with the entire writing the legal effect of raising a trust which equity will both enforce and protect. For these reasons we think the court erred in sustaining the demurrer to the appellant's petition and in dissolving the injunction. Wherefore the judgment is reversed and the cause remanded for further proceedings.

Harcourt, Bullock & Anderson, for appellant.

Bullock & Davis, Barker, for appellee.

ZEB WARD, ETC., v. CLAXTON & JONES.

Payment—Check and Receipt for Same Sum.

Among the vouchers found in the record is a check dated Louisville, April 1st, 1865, drawn by J. C. Hall in favor of T. M. Jones, for one thousand dollars on hay and corn. And there is also among the vouchers exhibited a receipt signed by T. M. Jones, dated Louisville, April 1st, 1865, to J. C. Hall for Ward and Helm for one thousand dollars on hay and corn.

Held, that the coincidence of date, amount, person to whom paid, and for what paid, expressed in the same words, and in the same order, could scarcely exist, unless the receipt was for the identical sum for which the check was drawn.

Evidence—Competency of Statements as to Indebtedness.

The statements of the defendant, made to third parties, in relation to his indebtedness to the plaintiff, is competent evidence in an action on an open account.

APPEAL FROM FRANKLIN CIRCUIT COURT.

April 27, 1872.

Opinion of the Court.

OPINION BY JUDGE PETERS:

The accounts between the parties were certainly very badly kept, and therefore it is very difficult to arrive at a satisfactory conclusion. It is not very improbable that in the confused state of the accounts some of the evidence of payments may have been duplicated. In confirmation of this position—among the vouchers in the record, is a check dated, Louisville, April 1, 1865, drawn by J. C. Hall in favor of T. M. Jones, on Tucker & Co., bankers for one thousand dollars on *hay and corn*.

And there is also among the vouchers exhibited a receipt signed T. M. Jones, dated Louisville, April 1, 1865, to J. C. Hall for Ward and Helm for one thousand dollars on *hay and corn*. The coincidence of date, amount, person to whom paid, and for what paid, expressed in the same words, and same order, could scarcely exist, unless the receipt was for the identical sum for which the check was drawn.

M. B. Perry proves that he was present in Louisville in October, 1865, when J. C. Hall and appellees were together stating their accounts, when Hall called over the payments which he claimed to have made, of which the witness made a memorandum at the time, and according to his statement, appellants were indebted to appellees near \$4,000, and afterwards in Versailles, Ward & Helm did not deny they were indebted to appellees.

Ellis proves that in a conversation between Hall and appellees in his presence he heard Hall say he had paid them small sums and taken receipts for the same, at different times, and when he paid them some more money he took receipts embracing what was then paid, and what he had previously paid, taking receipts for all of said sums.

That he had heard Hall say several times they were indebted to Claxton and Jones, that their claim was correct, and disputed no part of it, and spoke approvingly of their conduct.

Smith proves a conversation between Hall and appellees in his presence as late as 1867, in which Hall admitted appellee's claim was just and should have been paid and apologized to them for the failure of his partners to pay them. Claxton's testimony is to the same effect. And Spillman proves that in a conversation with Helm on the subject of their indebtedness

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to appellees, he expressed regret that they had not been paid, and requested the witness to converse with Hall, and if Hall did not have the funds on hand to pay them, he and Ward would have to raise them.

It does not appear that it was ever claimed by appellants that they had fully paid appellees, much less that they had ever paid them and especially so much as is now claimed they had done. And it is not probable that they could have ever paid appellees and remained ignorant of it until they were sued, and continued on repeated occasions to admit an indebtedness.

On a trial by a jury a much larger amount was found for appellees than was adjudged by the chancellor. But on a second trial in a different *forum* appellants are again found to be indebted to appellees and we fail under all the facts disclosed to see that injustice is done.

Wherefore the judgment is affirmed on the original and cross appeal.

Craddock & Trabue, for appellants.

Lindsay, for appellees.

I. C. VANMETER *v.* RODES WOODS.

Improvements—Made on Real Property by Another Than the Owner of the Soil—Rights and Liabilities—Acquiescence.

The appellee contributed every dollar necessary to construct the storehouse in controversy, which was built on the lands of the appellant and with his full knowledge and consent, although there was no contract between them. The appellee occupied the house for some months previous to the institution of the suit, with the acquiescence of appellant. Whilst the building was being constructed, the appellant talked with appellee about it, and spoke of the manner in which the foundation was to have been built.

Held, that a court of equity, under such circumstances, would not give to the owner of the land this expenditure of the appellee's money without some compensation, and that appellee's equitable right to recover the value of the house, less the rent, is clearly established.

APPEAL FROM WOODFORD CIRCUIT COURT.

January 10, 1872.

Opinion of the Court.

OPINION BY JUDGE PRYOR:

The appellee, Woods, as appears from the evidence in the case, contributed out of his own means every dollar necessary to the construction of the store house in controversy. The house was built on the land of the appellant with his full knowledge and consent, and although there is no proof of any contract between the appellant and the appellee, it is hardly to be presumed that the appellee without right, and in the absence of any contract would construct such a building upon appellants lands without some understanding in regard to his right to use and occupy it. The appellee not only built the house out of his own means, but used and occupied it for some months previous to the institution of this suit, with the acquiescence at least of the appellant. Whilst the building was being constructed the appellant talked with appellee in regard to it, and spoke of the manner in which the foundation was to have been built. At court of equity under such circumstances, would not give to the owner of the land, this expenditure of the appellees money, without some compensation, it may be and in fact, the proof shows, that an old gentleman by the name of Offut claimed to have obtained the right to build on this lot from the appellant. This, however, is not brought home to the appellee and if it was, there is no proof that the appellee entered under Offut or by reason of any agreement made between Offut and the appellant, waiving all the exceptions made by appellee to the depositions read, and looking to the whole evidence as taken, the appellee's equitable right to recover the value of the house, less the rent, is clearly established.

The judgment of the court below is therefore affirmed.

J. R. Morton, for appellant.

Porter, Wallace, for appellee.

JOHN W. SMITH v. JAMES M. HARRISON.

Vendor and Purchaser—Parol Agreement as to Lien.

A vendee being present when the deed is written and accepts it after acknowledgment, a parol agreement to waive the lien for the purchase money must be regarded as having been changed.

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Vendor and Purchaser—Lien Reserved in Deed—Constructive Notice.

If a party purchases land with constructive notice of a vendor's lien, the law furnishes no means of escape from the burden.

APPEAL FROM LOGAN CIRCUIT COURT.

May 11, 1871.

OPINION BY JUDGE PETERS:

When the deed to Smith was written he was present, and after it was acknowledged he accepted it, and must have known its contents, if he did not it was certainly his own fault, and if there had been a parol agreement between Smith & Hammon that the lien for the unpaid purchase price should be waived, that agreement must be regarded as having been changed, and the one expressed in the deed substituted in its place.

But if that were not so the parol evidence is wholly insufficient to establish the alleged mistake, and to reform the deed.

Powell purchased with constructive notice at least of the vendor's lien on the land, and the law furnishes no means of escape from the burden.

Wherefore the judgment must be *affirmed*.

A. C. Rhea, W. W. Bush, for appellant.

Bowden, for appellee.

THOS. W. SHACKLEFORD v. HENRY M. AUSTIN.

Pleadings—Misjoinder—Objection Must Be Made in Lower Court.

If there is a misjoinder of parties in the petition, the objection must be made in the Circuit Court.

APPEAL FROM McLEAN CIRCUIT COURT.

April 21, 1871.

OPINION BY JUDGE PETERS:

Even if there was a misjoinder of the causes of action in the petition, no objection was taken to it in the court below, and we must regard the objection as waived.

If appellant fed and took care of appellee's hogs after he discontinued his distillery, although his contract was to keep them

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on still slop, nevertheless for his care, and food fed to the hogs he was entitled, under the *second* paragraph of his petition to such compensation as the jury might from the evidence believe he deserved to have, unless they should believe that his failure to feed them slop was of greater damage to them, than the value of the food and care bestowed on them was worth.

The first instruction asked by appellant was to that effect, and the court overruled, which was erroneous. Wherefore, for that error alone the judgment is reversed, and the cause is remanded for a new trial and for further proceedings consistent with this opinion.

Johnson, for appellant.

Tanner, for appellee.

ROBINSON STEWART *v.* ALVIN STEWART.

Vendor and Purchaser—Title Bond by One Since Deceased—Proof of Signature.

The holder of a title bond for land, executed by a person who has since died, must produce satisfactory evidence of the signature of the deceased before he can recover against the heirs.

APPEAL FROM LAWRENCE CIRCUIT COURT.

May 5, 1871.

OPINION BY JUDGE PETERS:

It was important that appellant should have proved by the subscribing witnesses if there were any, that Ralph Stewart executed the bond under which he asserts claim. Without some evidence of the execution of the bond, or of the signature of Ralph Stewart to the writing, appellant cannot successfully assert claim to the land against the heirs. The paper presented to Brown when the answer was drawn purported to be a bond for a title for the land, but Brown does not prove that the signature to it was Ralph Stewart's, nor that he ever heard him acknowledge it nor that he knew the signature to it to be R. Stewart's. We are not therefore prepared to say that the evidence was

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sufficient to establish the execution, and existence of the asserted bond.

Wherefore the judgment is affirmed.

Brown & Dawson, for appellants.

L. T. Moore, for appellee.

PHILLIP WEBSTER v. R. S. GADLIN.

New Trial—Decided Preponderance of Evidence.

The verdict was not sustained by the evidence, but there was a decided preponderance of evidence against it.

APPEAL FROM TAYLOR CIRCUIT COURT.

December 21, 1871.

OPINION BY JUDGE HARDIN :

We perceive no essential error in the action of the court, as to instructions, given or refused. But we are constrained to reverse the judgment for the reason that the verdict of the jury is not sustained by the evidence.

Giving to the circumstances proved, as pointing to the appellant as guilty of the trespass alleged, their greatest weight, they do not, in our opinion prove the charge with any reasonable certainty; but whatever might have been their effect, we regard it as neutralized by the positive statements of the defendant, proved and rendered competent by the action of the plaintiff; and the court ought to have granted a new trial because the verdict was not sustained by the evidence, but there was a decided preponderance of the evidence against the verdict.

The judgment is reversed and the cause remanded for a new trial.

B. G. Mitchel, for appellant.

J. K. Robinson, Howell, for appellee.

JOSEPH YATES v. JESSE HAMBRICK, JR., ETC.

Trial—Error in Response to Inquiry of the Jury—Exceptions.

An essential error in the response of the court to the inquiry of the jury, or the failure of the court to answer directly the questions propounded by the jury, if proper exceptions are taken, is an available error.

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APPEAL FROM SCOTT CIRCUIT COURT.

January 6, 1872.

OPINION BY JUDGE HARDIN:

Whether there was any essential error in the response of the court to the inquiry of the jury, which they had a right to make, or whether or not there was any available error in the failure of the court to answer directly the questions which the jury propounded, if proper exceptions had been taken, as we must presume that the parties, or their counsel were present, and as no exception was taken, the supposed errors of the court are not now available in this court, and there is no other error apparent in the record.

Therefore, the judgment is affirmed.

Adams, for appellant.

Darnaby, for appellee.

MOSES YOWELLS, ADMR., v. JOHN YOWELL, ADMR.

Fraudulent Conveyance—Operates as an Assignment for Benefit of Creditors.

The sale of the deceased's estate after his death shows that it was insufficient, at that time, to pay his debts, but it does not necessarily follow that he was unable to pay them at the time he executed the mortgage.

APPEAL FROM TAYLOR CIRCUIT COURT.

January 3, 1872.

OPINION BY JUDGE LINDSAY:

There is no direct proof in the record to the effect that the mortgage to Leroy Yowell was executed by the deceased in contemplation of insolvency.

The sale of his estate after his death shows that it was insufficient at that time to pay his debts, but it does not necessarily follow, that he was unable to pay them on the 26th of

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April, 1869, when the mortgage was executed. His will, which was written on the same day, shows very satisfactorily that he believed he was then able to pay all he owed and secure to his wife and children a home. We do not think appellant made out such a state of case as would have authorized the chancellor to hold that the mortgage to Leroy Yowell, operated as an assignment of all the estate of the grantor for the benefit of all of his creditors.

Judgment affirmed.

Mitchell, for appellant

J. R. Robinson, Montague, for appellee.

J. H. TAYLOR *v.* WM. DUVAL ET AL.

Judgment—Pleading—No Proof.

Where the material allegations of the petition are denied, it is error to render judgment against the defendant in the absence of any proof.

APPEAL FROM NELSON CIRCUIT COURT.

December 21, 1871.

OPINION BY JUDGE LINDSAY:

If it be conceded that appellees would have had a right to subject the land sold by Taylor to Duvall to the payment of this note, disregarding the lien of Taylor, in case the allegations of the petition were true. Inasmuch as Taylor denied every allegation in this petition by which he could possibly be affected, and no proof whatever was taken, the judgment is erroneous, as to Taylor and so far as his rights are affected thereby, said judgment is reversed. The case is remanded with instructions to appellees to amend their pleading and to compel Taylor to enforce his lien, and for such further proceedings as will enable him to subject the interest of Duvall in the land, bought from Taylor, appellant.

Muri, Wickliffe, for appellant.

McKay, for appellee.

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MINERVA AND ARCHIBALD WOODS v. EMMA WOODS. ..

Wills—Estate in Fee—Defeasible Upon Dying Without Child.

"In the event of the death of my son John without children, then, in that event, after the death of my son John's wife, whom I will and desire shall enjoy and have the use of said property during her life, I will all of said estate of any kind and description to my four grandchildren, share and share alike."

Held, that as John died leaving a son, the contingency upon which the devise over of a life estate to appellee had not happened. John took the estate in fee simple.

APPEAL MERCER CIRCUIT COURT.

April 29, 1872.

OPINION BY JUDGE LINDSAY:

Appellee, who is the widow of Dr. John T. Woods, deceased, bases her claim to the possession of the realty in controversy upon the following condition annexed to an estate therein devised to her said husband by the third clause of the will of his father, Archibald Woods, deceased. "In the event of the death of my son John without children, then, and in that event after the death of my son John's present wife, whom I will and desire shall enjoy and have the use of said property during her life, I will all of said estate of any kind and description to my four grandchildren, share and share alike."

Dr. Woods took under this will an estate in fee in the lands, defeasible upon his dying without a child or children living at the time of his death. It appears from the appellees petition that he did not die childless, but left one son, the defendant, Henry Woods. The contingency therefore upon which the devise, over of a life estate to appellee, and remainder in fee to the four grandchildren of the testator, has not happened. We are of the opinion that the testator did not intend that appellee should take the life estate unless his son John died without children. Such a devise over is wholly incompatible with an estate in fee simple and it is plain that John took an estate of that kind, to be defeated only by his dying without a child living at the time of his death. Appellee is entitled to dower in the lands, and to nothing more. The judgment is therefore reversed and the

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cause remanded for further proceedings consistent with this opinion.

Hardin, Gaither, for appellants.

Polk, for appellee.

JOSEPH WELLS v. NOAH MORRIS.

Specific Performance—Vendor and Purchaser—Deficit in Land Sold—Sale in Gross.

The sale of the land by appellant to appellee was in gross, but they did not contemplate more than the usual rate of excess or deficit.

Held, that in a case like this, a specific execution of a contract of sale will not be enforced where the deficit is as great as 33 per cent. of the estimated quantity of the land sold.

APPEAL FROM EDMONSON CIRCUIT COURT.

March 12, 1872.

OPINION BY JUDGE LINDSAY:

The sale of the tract of land by Wells to Morris was certainly a sale in gross, but we are of opinion from the proof in the case, as to locality, value, price and of the conversations between the parties that they did not contemplate or intend to risk more than the usual rates of excess or deficit, although it is apparent that Morris did not expect, and that he had no right to expect that the tract contained full one hundred acres. But he certainly did not calculate that upon actual measurements it would be found that there were only sixty seven and one-half acres.

We are aware of no case like this in which a specific execution of a contract of sale has been enforced, where the deficit was as great as 33 per cent. of the estimated quantity of land sold.

There is nothing in this case to take it out of the general rule, and we cannot conclude that the chancellor erred in refusing to compel a specific execution of the contract.

His judgment must be therefore affirmed.

V. H. Jones, for appellant.

R. Rodes, for appellee.

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GEORGE T. WOOD v. B. F. BURRIS AND WIFE.

Accounts, Action On—On Whose Credit Sold.

A creditor can not recover against a wife for goods sold to the husband and daughter, without showing that the credit was given to her.

APPEAL FROM MASON CIRCUIT COURT.

January 25, 1872.

OPINION BY JUDGE LINDSAY:

The testimony does not show that the articles delivered to the husband and daughter of the appellees were sold on her credit or charged to her. There is no evidence tending to show that she authorized appellant to sell to her husband or daughter, or that she knew prior to the execution of the note sued on, that he looked to her for the payment of the accounts embraced in said note. The appellant can not recover against the appellee, without showing that the credit was given to her. Sub. Section 1, section 1, article 2, chapter 47, Revised Statutes. Eastwood vs. Bryan, 7 Bush 509.

Throop, for appellant.

F. Y. YAGER v. L. W. SALE ET AL.

Trial—Law and Facts Submitted to the Court—Judgment Will Not Be Disturbed.

Where the proof is conflicting, and the law and facts have been submitted to the court, the judgment will not be disturbed unless the judgment is palpably against the weight of the evidence.

APPEAL FROM JEFF COUNTY COURT.

February 8, 1872.

OPINION BY JUDGE PRYOR:

The proceeding in this case is by motion to recover of the appellee as constable for failing to collect an execution in favor of the appellant against Miller and Fowler. The only ground relied on in the motion is, that the defendants in the execution

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had amply property out of which the execution could have been made—the law and facts were submitted to the court—proof was introduced upon both sides in regard to the solvency of the debtors in the execution—the proof is conflicting and this court will not disturb the verdict of a jury, or the judgment of a court where a question of fact is submitted in a case like this, unless the verdict or judgment is palpably against the weight of evidence.

Judgment affirmed.

Jeff Brown, for appellant.

HENRY D. TUCK, ETC., v. M. W. OGBURN, ETC.

Fraudulent Conveyance—Recitals in Deed Not Evidence Against Stranger.

The recitals in a deed, although evidence as between the parties thereto, are not evidence as against those who are not parties or privies.

Principal and Surety—Indulgence—New Promise to Pay Usurious Interest.

Where indulgence is given the principal at the instance of the surety, a new promise upon the part of the principal debtor to pay usurious interest will not release the surety.

Principal and Surety—Sale of Principal's Property at a Sacrifice—Duty of Surety to Make Property Bring Debt.

Where the property of the principal is sold under execution, it is the duty of the surety to make it bring its value, if he desires to be relieved from liability.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

February 3, 1872.

OPINION BY JUDGE PRYOR:

The conveyance by the Appellant Tuck to Mrs. Farrar was fraudulent as to the creditors of Tuck. There is no proof in this case of the payment by Mrs. Farrar to Tuck of the consideration expressed in the deed. The evidence does not establish any indebtedness by Tuck to Mrs. Farrar and the mere recitals in the deed although evidence as between the parties

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thereto, are not evidence as against those who are not parties or privies. So far as this conveyance is to operate against the claim of the appellee it stands as if not one dollar of consideration had been paid by Mrs. Farrar for all the interest of Tuck in his father's estate. 3 Bush p. 402. Tuck is in no condition to escape liability by reason of the indulgence to the principal debtor in the execution. This indulgence as the sheriff swears was given at the instance of Tuck, and the new promise upon the part of the principal debtor to pay usurious interest does not release the sureties. If the property levied on sold at a sacrifice it was the fault of the sureties as it was their duty to make it pay the debt, if they desired to be relieved from liability.

Judgment affirmed.

McPherson, Chaplin, for appellant.

H. A. Phelps & Son, R. T. Petree, for appellee.

J. H. TODD v. WM. BACON.

Ejectment—Sufficiency of Answer—Material Allegations of Petition Must Be Specifically Denied.

In his answer appellant denies that appellee is the owner and entitled to the possession of the land described in the petition. He further denies that he now holds possession of the land without right, or ever held the same without right. And denies that he has for years past unlawfully kept the plaintiff out of possession.

Held, that the import of this language is not a denial of the simple fact that appellant was in possession of this land at the commencement of the action, but a denial that his possession was unlawful. Unless every allegation of the petition is specifically denied, it is taken as true for the purpose of the action, and it is not necessary to introduce proof on that point.

Deeds as Evidence—Registration When Land Lies in Two Counties.

Where the land embraced in a Deed lies in two counties, it may be read as evidence, in an action of ejectment, if it has been recorded in the county where the greater part of the land lies.

Deeds—Construction—General Recitals Must Give Way to Particular Descriptions.

Where the actual location of the land in contest is the question involved, the general recitals in a deed should not be allowed to control the more minute description subsequently given.

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Ejectment—Exceptions in Deed—Burden on Plaintiff.

Where a deed under which the plaintiff claims title, in an action of ejectment, contains exceptions, the burden is on him to show that the land in controversy is not within the exceptions.

APPEAL FROM GARRARD CIRCUIT COURT.

January 25, 1872.

OPINION BY JUDGE PETERS:

This is an action in the nature of an action of ejectment brought by appellee, against appellant for the recovery of 118.45 acres of land, in the Rockcastle Circuit Court and judgment having been rendered in favor of appellee for the land claimed in the petition, appellant seeks a reversal therefor.

The first ground relied on is that there is no evidence that appellant was in possession of the land sued for before or at the commencement of the action.

To ascertain whether such evidence was necessary, the precise state of the pleadings must be examined, and the effect determined. It is alleged in the petition that appellee is the owner, and entitled to the possession of the land described by metes and bounds, and that appellant holds possession of the same without right, etc.

In his answer appellant denies that appellee is the owner and entitled to the possession of the land, described in the petition. He further denies that he now holds possession of the land without right, or ever held the same without right. And denies that he has for years past unlawfully kept the plaintiff out of possession. The evident import of this language is not a denial of the simple fact that appellant was in possession of the land at the commencement of the action, but a denial that his possession was unlawful.

The plea of not guilty in the action of ejectment prior to the adoption of the *civil code* put in issue all the material facts constituting the cause of action, except the lease, entry and ouster which were generally admitted on the record, but under the code unless every allegation of the petition is specifically denied it is taken as true for the purpose of the action.

From the character of the answer therefore it was not necessary to introduce evidence on the point of possession.

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The next objection worthy of consideration is whether the deed from Beckley to appellee was competent as evidence. It is true that in the premise, it is recited that the land was situated in the county of Lincoln and the deed was recorded in that county, while the land sued for is situated in the county of Rockcastle, which was formed many years before the conveyance was made, but in a subsequent part of the deed the land is particularly described by metes and bounds.

The statute on the subject of the registration of deeds provides, where a tract of land lies in two counties, the conveyance may be recorded in the county where the greater part of the tract lies, and a certified copy of the deed may be read in evidence. It is shown that the greater part of the 10,000 tract embraced in said deed lies in the county of Lincoln, the mere general recital as aforesaid in the deed should not be allowed to control the more minute description subsequently given, and under the law the deed was competent.

But this deed contains exceptions of quite a number of smaller tracts, held by persons therein named, and under prior claims as the deeds recite.

At the close of the evidence the law and facts having been submitted to the court without the intervention of a jury appellant moved the court for a dismissal of the petition for various reasons, one of which was that there was no evidence showing that the land for which he was sued was not embraced in some of the various exceptions contained in the deed, and that is the next ground relied on for a reversal that we propose to consider.

As was said by this court in *Guthere vs. Lewis's Devisees*, 1 Mon. 141, these different parcels of land excepted in the deed from Beckley to appellee can not pass thereby, and the deed can not operate as a grant but for the residue. To so much therefore of the land included in the deed of Beckley only has appellee shown title, and whether the part to which he has shown title includes the land in controversy or not, could only be shown with certainty by ascertaining the position and boundaries of the several parcels excepted in the deed and to which he has shown no title. This he has not done; the situation and boundaries of no one of the excepted parcels can be ascertained

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from the record. And from anything to the contrary that appears the land in controversy may be included in the excepted parcels. But the uncertainty, whether it is so included or not, it was in the power of appellee to remove, and having failed to do so, he has not therefore produced the most satisfactory evidence in his power of his right and was not entitled to the judgment in his favor.

The terms of the writing purporting to be a release from appellee to his vendor, Beckley, are sufficient to release him so far as the parties thereto are concerned from any liability on the warranty of the vendor, and there is nothing in the record to show that Bacon has ever parted with the title to the land in dispute, such title as he may have acquired from Beckley. Indeed, Dewes, to whom the lands seem to have been conveyed, has conveyed back to Bacon the tract in dispute, if we are to form an opinion from the identity of the boundary of the land described in the petition, and one of the tracts described in the deed from Dewes to Bacon copied in the record. We conclude therefore that Bacon's grantor was rendered competent by the release to him.

The witness proves that the person, who was his mother, was the wife of the testator and to whom he devised the one-half of his estate. And whether he described her by the same name his father did is not material. He proves the identity of the person.

Bnt for the reason indicated the judgment is reversed, and the cause is remanded with directions to order a new trial and for other proceedings consistent herewith.

Bradley, Durham, for appellant.

Jacobs, Brown, for appellee.

JOHN G. TULLY *v.* CANE RUN AND KINGSMILL TURNPIKE
ROAD COMPANY.

**Corporations—Subscriptions to Capital Stock Before Organization—
Change of Name.**

The appellant took two shares of stock, but at the time the subscription was made no act of incorporation had been obtained. Shortly thereafter application was made to the legislature and an act in-

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corporating the company obtained, but under a different name from that set forth in the subscription paper.

Held, that the legal effect of the obligation is to pay so much money to construction of a particular turnpike road, and the change of the name of the company, whether by a vote of the directors, or by an act of the legislature, does not alter appellant's liability.

Corporation—Subscription to Capital Stock—Act of Incorporation—Can Not Enlarge Responsibility.

Where the act of incorporation enlarges the legal liability of the stockholders, and assumes liabilities that, by the express terms of the subscription, were prohibited, a subscriber will be released of his obligation.

Corporations—Subscription to Capital Stock—Consideration.

The appellant and his neighbors undertook with each other to pay certain specified sums of money to aid in the construction of an improvement for their mutual benefit. The subscription by one was the consideration of the subscription of the others.

APPEAL FROM MERCER CIRCUIT COURT.

December 20, 1871.

OPINION BY JUDGE PRYOR:

The appellant with many of his neighbors being desirous of constituting a turnpike road in the county of Mercer where they lived, obligated themselves in writing to pay the president, managers, etc., of the "Harrodsburg and Can Run Turnpike Company" the sum of fifty dollars for every share of stock taken by each subscriber.

The appellant took two shares of stock amounting in all to one hundred dollars. At the time this subscription was made by the parties no act of incorporation had been obtained, but shortly after, an application was made to the Legislature and an act incorporating the company obtained, but under a different name from that set forth in the subscription paper. It does not appear that the appellant assisted in the procurement of this act, or by an act of his, ratified it, after its incorporation. The company under the corporate name of the Cane Run and Kingsmill Turnpike Road Company, instituted the present action against the appellant, in which they allege a failure upon his part to pay his stock, and ask for judgment. It is insisted by

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the appellant's counsel that the demurrer to the petition should have been sustained, as the exhibit filed evidencing appellant's liability shows that it is an agreement to pay a different company than the one in whose name the suit is brought, and for the additional reason, that the petition does not set forth a cause of action.

The petition alleges, that the paper signed was to raise money to build a particular road, giving the locality, as well as the beginning and terminous of the same; that this paper was signed previous to the act of incorporation, and is payable as it shows upon its face to the president, managers, etc., of the Harrodsburg and Cane Run Turnpike Road Company that after this paper was signed, an act of the Legislature was obtained incorporating the same company, but in a different name, viz: The Cane Run and Kingsmill Turnpike Road Company. That it is the same company for which the subscription was made as well as the same road; that the parties thereto, and the purposes and objects are all the same, and the only change really made is in the name of the company.

The act of the Legislature can not enlarge or affect the legal responsibility of the appellant on the original paper, and has not affected it in any way, unless the change in the name of the corporation releases him from his subscription. The case referred to by appellant's counsel in *Goff v. Winchester College*, 6 Bush, 443, is not analogous to the case we are now considering.

The act of the Legislature in that case enlarged the legal liabilities of the stockholders, and the corporators had undertaken to contract debts and assume liabilities that by the express terms of the subscriptions they were prohibited from doing, without the consent of the stockholders. In the this case the appellant, by the demurrer, admits that he signed the paper filed with the petition. He admits that it is the same company, composed of the same parties, the same road and that the company or some of them have had the corporate name changed. No action could have been maintained by the appellees upon the obligation on the original name of the company, for the reason that the name had been changed by Legislative enactment. The effect of the obligation is to pay so much money to the construction of a particular turnpike road, and the change of the name

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of the company, whether by a vote of the directory, or by an act of the Legislature does not alter appellant's liability.

If the act of the Legislature had changed the route of the contemplated road in such a manner as to deprive the appellant of the benefits to be derived from it, then his rights would have been so materially affected as to release him from obligation, but in this case the testimony of King and others show that it is the same road and the same company, and built from the moneys subscribed to the paper made an exhibit with the petition, the execution of which the appellant does not deny.

The appellant and his neighbors undertook with each other to pay certain specified sums of money, to aid in the construction of an improvement from which all were to derive a local benefit. The subscription by one, was the consideration of the subscription of the others. The neighbors have used their money in executing this joint undertaking, from which all are to derive a common benefit and we perceive no reason why the appellant should not be held responsible. The demurrer to the petition was properly overruled and the allegations thereof are sustained by the proof.

The judgment affirmed.

Durham, J. D. Hardin, for appellant.

C. A. Hardin, for appellee.

WILLIAM E. YOUNG v. G. T. EDWARDS.

Bills and Notes—Action of Assignee Against Assignor—Necessary Averment—Due Diligence Must Be Shown—Reference to Execution and Return Not Sufficient.

In order to charge an assignor, suit must not only be brought, but it must appear that due diligence has been used in suing out an execution on the judgment, and an averment of the time when and to the county to which it issued, is as necessary in stating a cause of action as the allegation of prosecution of the action and the recovery of the judgment, and it is not sufficient to say that "an execution was duly issued on said judgment." Due diligence is a question of law, and in order that the law may pronounce its judgment, the facts must be stated. Nor will the omission be supplied by a reference in

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the petition to the execution and return. The facts, including the history of the case, from the assignment of the note to the suing out of the executions, must be stated. A reference to them and an offer to file them "if necessary" make them no part of the petition.

Bills and Notes—Action Against Assignor—When Execution Must Issue Against Payee.

A failure for seven days to issue an execution after it might have issued by an assignor is not such delay as to release the assignor of liability.

APPEAL FROM LOGAN COUNTY CIRCUIT COURT.

March 19, 1872.

OPINION BY JUDGE PETERS:

This action was brought by appellant as assignee of a note on N. G. Skipworth against appellee as his assignor to recover of him the amount he failed to collect from the obligor.

To his petition a demurrer was sustained, and having declined to amend the same, it was dismissed and from that judgment this appeal is prosecuted.

The note was assigned by appellee to appellant on the 1st of October, 1866, was due the 25th of December of the same year, and it is alleged in the petition that suit was brought on it in the Muhlenburg Circuit Court, the county in which the obligor lived on the 30th of March, 1867, and judgment recovered thereon at the June term of the same year, that being the first term of said court after the maturity of the note, and then it is alleged that, "Execution was duly issued on said judgment, and placed in the hands of the sheriff of said Muhlenburg county, and duly returned to the office of the circuit clerk of said county, endorsed, in substance, no property found to satisfy the *fifa* or any part thereof."

Appellant then avers that a suit was brought to foreclose the vendor's lien on the land sold by the payee in said note to the obligor, the recovery of a judgment therefor and a sale of the land which he avers only brought \$150.00, leaving a balance of about \$190.00 of the debt unpaid including the costs of the action at law and the suit in equity to foreclose the lien, and says, "A copy of all the above named suits, process which

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issued therein, orders, decrees, and judgments will be filed herewith if necessary."

It is not alleged in the petition when the execution issued on the judgment, nor when it was returned. In order to charge the assignor of a note, suit must not only be brought, but it must appear that due diligence has been used in suing out execution on judgment, and an averment of the time when and to the county to which it issued is as necessary in stating a cause of action, as the allegation of the prosecution of the action and the recovery of the judgment. And it is not sufficient to say that "An execution was duly issued on said judgment" that is but the pleader's conclusion. Due diligence is a question of law, and in order that the law may pronounce its judgment, the facts must be stated. Nor will the omission be supplied by a reference in the petition to the execution and return. The facts including a history of the case from the assignment of the note to the suing out of the execution must be stated, and from that the court can adjudicate. But even if a mere reference to the execution and return would supply the place of averments that is not done in this case.

A reference to them and an offer to file them "if necessary," makes them no part of the petition. Who is to judge whether it is necessary to file the papers referred to, and when is the question to be determined? It certainly could not be considered good pleading for a plaintiff to state in his petition that he would make an averment of a material fact if it were necessary. He must determine whether it is necessary, or not, and that at his own peril.

The petition in this case was insufficient in failing to aver when the execution issued, and for that reason the demurrer was properly sustained to it.

If the execution issued within fifteen days after the judgment was rendered we are not prepared to say that delay amounted to a want of due diligence. A failure for seven days to issue an execution after it might have issued by an assignee, without any excuse for the delay, is the utmost to which this court has gone, and in the two cases in which it was so decided there was a divided court, the chief justice in both cases assenting. And

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we do not feel authorized to abridge that limit in favor of the assignor.

If the assignor was prejudicial by a failure of the appellee to bring a suit to foreclose the lien on the land, that can be shown by proper pleading and evidence.

But for the reasons indicated we are constrained to affirm the judgment sustaining the demurrer to the petition.

Rhea, for appellant.

Edwards, W. L. Reeves, for appellee.

ULLMAN & Co. v. WM. CLOYD.

Attachment—Lien Created by Garnishment—Judgment Sustaining Attachments Not Final.

Where several creditors attack the property of their common debtor, and one of them summons a third party as garnishee, he has a prior lien on this debt, notwithstanding it was not mentioned in the judgment sustaining the attachments. The judgment for the debt at one term does not preclude the court from rendering judgment against a garnishee, summoned at a subsequent term.

Bills and Notes—Judgment Against One Obligor at one Term Does Not Prevent Judgment Against Co-Obligor at Another Term.

Where Joint Obligors are sued on a note, a judgment Against one of them does not prevent a judgment against the other at a subsequent term, although both were served with process at the same time.

APPEAL FROM MARION CIRCUIT COURT.

December 15, 1871.

OPINION BY JUDGE PRYOR:

W. Jarboe was sued in the Marion Circuit Court by several of his creditors and attachments obtained for the purpose of securing their claims.

Ullman and Company and Cloyd (the appellant and appellees in this case) were among the creditors instituting these suits. The land of Jarboe was attached and perhaps other property, and in the case of Cloyd a man by the name of Rice was summoned as a garnishee, and who, it seems, was largely indebted to Jarboe.

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Rice was not summoned as a garnishee by any of the other creditors. These various suits were heard together, and a judgment rendered for the debts of the attaching creditors and also a judgment sustaining the attachments and directing the property sold. In the judgment rendered no mention was made of the Rice claim that had been garnisheed and no disposition made of it in any way. Jarboe brought the case to the Court of Appeals and for error affecting his rights the sale of some of the real estate was directed by this court to be set aside. The judgment, however, for the debts, and sustaining the attachments, was not disturbed by this court. After this, or during the pendency of the suit in this court, Ullman and Company having obtained an execution and return of no property found on this judgment, filed their petition to subject the debt due by Rice to Jarboe to the payment of their debt. Rice was served with process, as well as Jarboe, and all the suits including the original suits in which an appeal was taken to this court, were heard together, and the court below decided that Cloyd had a prior lien on the Rice debt, for the reason that he had summoned Rice as garnishee in the original suit, in which the judgment had been rendered, long before the appellant, Ullman, had proceeded to subject this debt by his equitable proceeding. The appellant insists that the judgment ascertaining and fixing the liability of Jarboe to each one of the creditors, and sustaining their attachments, was complete and final, and inasmuch as the garnishee, Rice, was not by that judgment directed to pay the money to Cloyd, that his lien was lost. In other words, that this judgment was a final adjudication of all the rights of the parties. The judgment had determined the amount, each party was entitled to recover of the defendant, Jarboe, and had directed a sale of the attached property, and so far as Jarboe and his creditors were concerned, the judgment fixing the amount of recovery was final, but there was a proceeding against a third party, the debtor of Jarboe, by Cloyd, to enable him to collect this judgment he had obtained. This branch of the case was undetermined, and as between Cloyd and Rice no adjudication had been had. There was nothing to have prevented Cloyd upon the return of the case from this court, from filing his amended petition with the statement that other parties than

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Rice were indebted to Jarboe and upon this amendment they could all have been summoned as garnishees. It was not necessary to file grounds showing newly discovered facts in order to reach the debtors of Jarboe. In this case the garnishee was before the court, properly summoned, and a judgment requiring him to pay the money into court did not disturb or affect the judgment against Jarboe. The effect of a judgment for the debt at one term does not preclude the court from rendering judgment against a garnishee summoned at a subsequent term. Nor does a judgment against one obligor upon a note at one term prevent a judgment against a co-obligor at a subsequent term, although both were served with process at the first term. There never was any final disposition of the original suit until the present judgment was rendered by which the rights of the creditors were determined. The parties were all before the court and suits still pending. Ullman and Company were parties to these original suits, and they were heard together by the agreement of parties. The lien Cloyd created by the garnishee on Rice had never been released, nor had this question been determined by the court, and so long as it remained on the docket as a suit pending between these parties the court had the power to enforce the payment of the money into court by Rice under the summons against him as garnishee.

The judgment is affirmed.

Harrison, for appellant.

Noble, for appellee.

CHAS. WINFREY'S ADM'R v. LEWIS GRIFFIN, ETC.

Executors and Administrators—Suit by Distributees to Settle Estate—Receiver.

Where a suit is brought by distributees against an administrator for the settlement of the estate, and assets are shown to be in his hands, the court will appoint a receiver and have the money in court for the purpose of more speedily adjusting the rights of the parties and effecting the object of the suit.

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Executors and Administrators—Refunding Bond—Paying Money into Court Discharges Liability.

The presumption is that after the lapse of five years from the grant of administration no debt will come against an administrator, and if under the statute he should be liable, a judgment of the court requiring him to pay the assets to its receiver would discharge him from liability. A refunding bond is therefore not necessary.

APPEAL FROM HENDERSON CIRCUIT COURT.

March 27, 1872.

OPINION BY JUDGE PETERS:

In cases like this where suits are brought by distributees against an administrator for the settlement of the estate and assets are shown to be in the hands of the administrator and admitted by him, if the court undertakes the settlement of the estate, it will appoint a receiver, and have the money in court for the more speedily adjusting the rights of the parties, and affecting the objects of the suit.

The power of appointing receivers, and having trust funds in court to be subject to its orders, has been exercised by courts of chancery from a very early period. Resting to be sure in the sound discretion of the court, and unless there has been an abuse of that discretion by a court below, this court would not interfere. In this case we see no abuse of the discretion.

Over five years had elapsed from the grant of letters of administration to appellant when the judgment complained of was rendered, no debts were likely to be presumed against him, and if under the statute he would be liable after the expiration of five years, the judgment of the court requiring him to pay the assets to its receiver would discharge him from liability. No refunding bonds were therefore necessary.

But we are not satisfied that appellant was properly charged with \$210.00, estimated value of fourteen cattle not accounted for; \$499.67, value of twenty-nine fat hogs, and \$520.00, adjudged value of tobacco in barn over the amount accounted for.

The slaves of decedent were not free at the beginning of the year 1865. The evidence shows they could not be hired out. Some of the distributees, on consultation with the administrator, advised that they should be kept on the place and an effort

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be made to make a crop that year with them, and with that object the necessary provisions had to be laid in, and a portion of the hogs and the corn on the place were set apart for that purpose. After the arrangement to make the crop failed, and some of the men had abandoned that place, the administrator sold the pork and lard left and accounted for the proceeds and it does not seem just that he should account for anything more.

The administrator has accounted for 9,450 pounds of tobacco in barns, and it seems, too, as that the evidence does not authorize a greater quantity to be charged to him. Adams, who was employed by the administrator to manage the farms and protect the property, proves there were between 8,000 and 9,000 pounds of the tobacco, that the appraisers estimated it at that quantity and he did not think there was any more than that. Martin says he estimated the tobacco in barns at from 10,000 to 12,000 pounds, but he formed his opinion from general appearance and reports of others. This certainly is not sufficient to overturn the opinions of the appraisers acting upon oath, and of Adams whose opportunity of judging was better than Martin's. We therefore conclude that the administrator was improperly charged with \$520.00 for tobacco more than he accounted for. It does not appear that the witness Hill ever told the administrator any one else that he would have given seventeen cents per pound for the tobacco, nor that he made the offer, and Mason and others prove that ten cents per pound was the highest price for it.

As to the cattle the report of the master is very unsatisfactory, as it is in other respects. J. Vanada proves that some of the cattle were drowned, perhaps ten or twelve, when the commissioner reports only fourteen unaccounted for and the report fails to set forth how many cattle were reserved on the place when the parties had it in contemplation to make a crop in 1865, and whether at the first sale all the cattle except these were not sold. It was therefore erroneous to charge the administrator with the \$210.00 for the missing cattle, and he could be credited by that sum; also \$499.67, value of twenty-nine fat hogs, and the \$520.00, estimated value of tobacco in the barn improperly charged against him, aggregating the sum of \$1,299.67 and for which the judgment should credit. The judgment

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must be reversed for the errors indicated, none others appearing, and the cause remanded with directions to render a judgment for the residue after deducting the aggregate sum specified \$122.67 and for further proceedings consistent herewith.

And the judgment affirmed on the cross-appeal.

Ray, Sweeney, for appellant.

Bush, Vance, for appellee.

A. D. WHITSON V. RALPH BRIGHT.

Injunctions—Proceeding to Enjoin Judgment—Fraud and Mistake—Facts Must Be Discovered After Rendition of Judgment.

In a proceeding to enjoin the collection of a judgment upon the grounds of fraud in obtaining it, or mistake of fact by the defendant, it must be shown that such fraud or mistake was discovered subsequent to the rendition of the judgment, and when a party fails to make a defense in a suit at law, in the absence of fraud on the part of the plaintiff in obtaining the judgment, it will not be set aside.

APPEAL FROM GALLATIN CIRCUIT COURT.

December 11, 1872.

OPINION BY JUDGE LINDSAY:

The charge of a fraudulent combination between Bright and Casey is utterly unsustainable.

The evidence certainly preponderates in favor of the conclusion that Whitson was present when the note was executed, and that he signed it with full knowledge of all the facts attending its execution.

From the testimony of Casey who was a competent witness, we may fairly presume that all parties were mistaken as to his rights to bind his late partner Roberts by signing his name to the new note whether this mutual mistake could have been made available by Whitson as a defense to the suit on the note it is not important to determine. He does not allege in his petition that he discovered it since the judgment in that suit was rendered, nor that he discovered since then the fact that Casey

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did not have actual authority from Roberts to sign his name to the note. These defences not having arisen since the judgment on the note are not grounds upon which such judgment can be annulled or modified by this proceeding in equity. Neither of them having been discovered subsequent to its rendition. Civil Code, section 14, for the same reason the allegation that the note embraced usury was properly disregarded. This fact was certainly known to Whitson before the judgment sought to be enjoined was rendered. M. S. S. opinion, June, 1859, *Chinn v. Mitchell*. Casey was a competent witness. He is not a party to the record, and his testimony in this cause cannot be used in his favor in any litigation between Roberts and himself for a settlement of these accounts. His interest as between Bright and Whitson is exactly equepoised. The authorities relied on by appellant are not applicable to this case for the reason that he failed to make defense to the suit at law, and in the absence of fraud upon the part of Bright his other grounds of complaint cannot now be considered. We do not deem it necessary to review the testimony touching the genuineness of Whitson signature to the note. Casey is uncontradicted and is not impeached. His testimony upon this point is conclusive.

Judgment *affirmed*. Chief Justice Prior did not sit in this case.

W. C. WHITAKER & Co. v. ELIJAH ALNUT & Co.**Appeals and Errors—Order Omitted From Original Record May Be Filed In Open Court.**

Where an order has been omitted in the original record it may be filed in open court, and there can be no objection to its being read as a part of the record.

Deposition—Courts of Chancery—Depositions Taken In One Cause Read In Another—Parties and Issue Must Be Same.

In courts of chancery the depositions of witnesses taken in one cause are frequently read as evidence in another, where the parties are the same. But they are never admissible as evidence even between the same parties, unless the same matters were in issue in the former cause that are involved in the subsequent one.

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APPEAL FROM HENRY CIRCUIT COURT.

February 7, 1872.

OPINION BY JUDGE PETERS:

The copy of the order for the change of venue in the case, omitted in the original record was filed in open court and there can be no available objection to its being read as a part of the record.

The deposition of Whitaker offered as evidence by appellants was taken to be read as evidence in a suit as appears of Joseph Fibb against Micajah Bibb's personal representative, in which the right to Whitaker's note, and others, with other property was involved—what constituted the consideration of the note now in question was not an issue in that case—and Whitaker was called on to prove what he had heard Micajah Fibb say on the subject of the ownership of the note and what he knew on that subject—and the consideration of the note was as it seems entirely foreign to the issue and it appears to have been set forth without having been called for, and was irrelevant, and might have been excluded as such. That being the case even if so much of the deposition as applied to the issue between the parties to the suit might under certain circumstances be read as evidence in a controversy between Whitaker and the party calling him to testify (a question we do not deem necessary in this case to decide). We cannot hesitate to conclude that facts stated by the witness not pertinent to the issue, and irrelevant, cannot be admitted as evidence for the party making such statements in a controversy between himself and the heirs, or representatives of the party who called him to testify.

In courts of chancery the depositions of witnesses taken in one cause are frequently read as evidence in another—where the parties are the same. But they are never admissible as evidence even between the same parties, unless the same matters were in issue in the former cause that are involved in the subsequent one. 1 Vol. Stark on Evidence, 266-7.

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The evidence, therefore, was incompetent, and as the defense was not made out after the deposition of Whitaker was rejected, the conclusion of the Circuit Court was correct.

Wherefore the judgment is *affirmed*.

The Chief Justice not sitting.

Walker, for Appellant.

Hornwood, for Appellee.

BRIDGET WILLIAMS *v.* TIMOTHY DALEY.

Landlord and Tenant—Change of Relation of Tenant to Purchaser—Burden of Proof.

Appellant entered upon the possession of the premises as tenant of appellee, and for some time paid him rent for the same at an agreed rate per month. The burden of proof is on her to establish that she had changed her relation as tenant to that of purchaser.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 6, 1872.

OPINION BY JUDGE LINDSAY:

It is conceded that appellant entered upon the possession of the premises in controversy as the tenant of appellee, that she agreed to and for some time did pay him rent for the same at an agreed rate per month.

There is some evidence of statements and admissions upon th part of appellee conducing to establish a subsequent sale of the property to Mrs. Williams, and also the payment by her to him of considerable amounts of money. This testimony is, however, vague and unsatisfactory, and the witnesses by whom the greater portion of it is detailed manifest a very decided interest in the success of this appellant in this litigation. One of them, and a very important one, the son of appellant, state facts which indicate that he knew nothing about the sale to his mother, more than two years after it is claimed to have been made. The evidence of appellee shows that Mrs. Williams recognized him as

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her landlord upon various occasions, and almost up to the time when this litigation commenced. She seems to have admitted this fact when testifying as a witness on the trial of a suit of forcible detainer. The amount of money proved to have been paid to appellee is no more than would be sufficient to satisfy the rent that has accrued on the property at the rate of twelve dollars and fifty cents per month (\$12.50). The burden of proof was upon appellant to establish that she had changed her relation as tenant to that of purchaser. Leaving out of view the payment by appellee of taxes, and insurance premiums on the property, we do not think the testimony in the record preponderates in favor of this conclusion.

The judgment of the circuit court *affirmed*.

Houston & Mulligan and Webster, for appellant.

Breckenridge & Thornton, for appellee.

THOS. WALDEN, ETC., v. ANDREW HUMPHREYS.

Judicial Sales—Non-residents—Constructively Summoned.

When a defendant constructively summoned has not been kept away by unavoidable accident or casualty, and no fraud or misconduct on the part of the plaintiff is shown, a judicial sale will not be set aside upon the mere ground that the property did not sell for its full value. If this should be done, it would soon become impossible to enforce judgments rendered in such cases.

Judgments—Non-resident—Revivor—Valid Defense.

Actions against parties constructively summoned may be revived within five years after judgment, provided such parties have a valid defense to present.

APPEAL FROM HARRISON CIRCUIT COURT.

December 6, 1871.

OPINION BY JUDGE LINDSAY:

We do not deem it necessary to determine whether or not the action of the court confirming a sale made in pursuance to its own decree, constitute such a judgment, as is contemplated by section 245 of the Civil Code.

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In the settlement of this litigation it may be conceded that it is, still we are of opinion that the court erred in its final order setting aside such order of confirmation and ordering a re-sale of the property. Actions against parties constructively summoned may within five years after judgment be revived, provided such parties have a valid defense to present.

The only defense appellee attempts to make to the motion for the confirmation of the commissioners sale is that the property sold for an inadequate price. It is not shown that the appellee was kept away by unavoidable accident or casualty, but it clearly appears that his absence was voluntary. No fraud or misconduct upon the part of appellants is shown or attempted to be shown.

The evidence does not satisfy us that this bid for the land was grossly inadequate. Upon this question the evidence is conflicting. If judicial sales are to be set aside in cases of constructive service upon the mere ground that the property did not sell for its full value, it will soon become impossible to enforce judgments rendered in such cases.

The interests of both the plaintiffs and defendants to such actions demand, that these sales shall be upheld, unless the purchaser has been guilty of some misconduct, or the price given is so grossly inadequate as to render it unconscientious for him to retain the property.

Judgment reversed and cause remanded with instructions to dismiss appellees answer and cross petition, and to make such orders as are necessary to quiet the title of the appellants to the lands purchased under this judgment.

J. S. Boyd, for appellant.

J. L. Griffith, for appellee.

TRUSTEES OF NORTH EPISCOPAL CHURCH *v.* JAMES CHAMBERS.

Religious Societies—Methodist Church—Power of Trustees to Mortgage Church Property—Mortgage Recognition of Debt—Limitation.

The mortgage executed by a majority of the trustees of the church was not only a direct recognition of the debt, but an unconditional promise to pay it. Hence, the statute of limitation can not be made available as a bar to recovery.

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Religious Societies—Power of Trustees to Convey Church Property—Notice to Preacher in Charge or Presiding Elder—Pleadings.

It is not alleged in the petition that prior to the partial execution of the deed the trustees had given the notice to the preacher in charge, or the presiding elder, as required by the Methodist discipline. This paper could not bind the church, nor has the chancellor the right to enforce its specific execution against that organization.

Religious Societies—Methodist Church—Advancement by Trustees—Reimbursement.

Under the church discipline the trustees might have advanced the amount due appellee, and then mortgaged the church property to raise money to reimburse themselves, and from this expressed delegation of power it may be implied that, with the creditor's consent, they may secure his debt by making the mortgage directly to him.

APPEAL FROM HARRISON CIRCUIT COURT.

January 23, 1872.

OPINION BY JUDGE LINDSAY:

The mortgage executed on the 18th day of May, 1854, to Hannah Chambers by a majority of the trustees of the church, was not only a direct recognition of appellee's debt, but an unconditional promise to pay it. Hence the statute of limitation cannot be made available as a bar to a recovery in this action.

The conveyance from Hannah Chambers to appellees operated in equity as a transfer to him of the benefit of her debt and mortgage. The paper dated January 16, 1866, purporting to be a deed from the church to Chambers, but which was not fully executed, shows upon its face that but three of the trustees participated in its execution.

It is not alleged in the petition that prior to the partial execution of this paper the trustees had given the notice to the preacher in charge, or the presiding elder of the district, as required by clause 7, section 4, par 2d of the Methodist discipline. This paper, therefore, does not bind the church nor has the chancellor the right to enforce its specific execution as against that organization.

All are of opinion, however, that the trustees had the right to execute the mortgage to Hannah Chambers.

Under said section of the church discipline, they might have advanced the amount due to Chambers, and then mortgaged the

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church property to raise money to reimburse themselves. From this express delegation of power we think may fairly be implied that when the creditor consents thereto they may secure his debt by making the mortgage directly to him. This valid mortgage remained in full force when this action was instituted and the court has the right to foreclose it and sell the equity of redemption remaining in the church.

It was error, however, to adjudge a conveyance of the mortgaged property to appellee.

Judgment reversed and cause remanded for further proceedings consistent herewith. As Hannah Chambers is a necessary party to this proceeding, upon the return of the cause the special demurrer to appellees petition should be sustained and leave given to present the necessary amendments.

A. H. Ward, for appellant.

Curry, for appellee.

M. C. HOLT v. C. W. MCGREW.

Bills and Notes—Assignment—Assignee May Assert Legal Rights of Assignor.

The appellee filed the note with his petition, with the assignment endorsed thereon, and this was evidence sufficient to authorize the rendition of the judgment against the appellant. The assignee of Sewell was before the court and entitled to assert the legal rights of Sewell himself, so far as they applied to the note in controversy.

APPEAL FROM KENTON CIRCUIT COURT.

September 9, 1871.

OPINION BY JUDGE PRYOR:

The court in rendering the opinion in this case inadvertently used the name of Mrs. McGrew when it should have been Mrs. Scott. The opinion should have read as follows, and this is now substituted for the opinion rendered. The demurrer by the appellant Holt to the petition in this case was properly overruled. The appellee, although the note had been assigned to him, by

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Mrs. Sewell, who at the time was a feme covert, makes her husband a defendant to the action, and also his assignee in bankruptcy C. McLean. The appellant and the assignee of Sewell (McLean) were before the court by service of process and Sewell and wife by constructive service. The appellee filed the note with his petition with the assignment endorsed thereon, and this was evidence sufficient to authorize the rendition of the judgment against the appellant. The assignee of Sewell was before the court and entitled to assert the legal rights of Sewell himself so far as they apply to the note in controversy. His failing to answer was an admission of the allegations contained in the petition, and there was no issue made as between the appellee and the non-resident defendants, so as to require the warning order to have been made ninety days before the judgment, nor are they complaining in this case. If Mrs. Sewell had no power to assign the note the assignee of the husband who represents him should have asserted his claim to it. No bond was necessary to be executed to the non-residents as no judgment was rendered against them and so far as the record shows they have no interest in the controversy. The answer offered to be filed by appellant after the submission of the cause was properly refused as it presented no defense to the action. The judgment is *affirmed*.

Menzies & Furber, for appellant.

Carlisle, for appellee.

HUGH THOMAS v. JAS. D. MILLER AND WIFE.

Descent and Distribution—Infant's Title by Descent From Father—Mother Has No Interest—Dower.

Where an infant dies, having derived title to real estate, by descent from the father, the mother acquires no right or title to such land, but the same passes by descent to the next of kin on the father's side, but the widow has her dower therein.

Executors and Administrators—Claim Against Decedent's Estate—Must Settle Accounts Before Selling Real Property.

If an administrator has a claim against the estate he should make a settlement of his accounts before he subjects the real estate to the payment of his debt.

Opinion of the Court.

APPEAL FROM ADAIR CIRCUIT COURT.

February 22, 1872.

OPINION BY JUDGE PRYOR:

There is no proof whatever in this record showing any evidence of fraud or mistake in the execution of the notes by the appellant to Mrs. Miller. The appellant was the administrator of James B. Thomas, deceased, and nearly related to him and was as much cognizant of the condition of his estate and perhaps more so than his widow. The purchase by him was a chancing or speculative bargain and if he has lost by it he alone must suffer. The judgment in the case, however, is erroneous. The mother did not inherit the land in controversy from her infant child. Where an infant dies having derived real estate by descent from the father, the mother acquires no right or title in and to such land owned by the infant, but the same passes by descent to the next of kin on the father's side. See section 9, revised statutes, title, descent and distribution. The judgment in this case directs the sale of the absolute right and title in and to the fifty acres of land upon the supposition that it belonged to Mrs. Miller. The only interest she had in it was her dower as the widow of James B. Thomas, and this alone could have been sold under the judgment. The holders of the legal title to this land are all before the court and they are not complaining of the judgment in the court below. The heirs of the infant child of Mrs. Miller could all be made parties to this controversy, and a judgment rendered subjecting only the dower interest to the payment of these notes. If the appellant has any claims against J. B. Thomas, deceased, or his estate, as he is the administrator, he should make a settlement of his accounts, and if there is any indebtedness the real estate can be subjected by a proper proceeding, and with this view his alleged set-off should be dismissed without prejudice.

The judgment of the court below is reversed, only so far as it seeks to sell the absolute estate in this fifty acres of land and for further proceedings not inconsistent with this opinion, and with directions to dismiss appellant's alleged set-off without prejudice.

Winfrey & Winfrey, for appellant.

James, for appellee.

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J. H. & J. W. WHITE v. G. W. BONDURANT.

Principal and Surety—Surety Bound by Statement, Notwithstanding Statute of Limitation.

A surety may be bound for the debt of his principal, by his statement, although the recovery against him as surety was barred by time.

Attachment—Proof of Fraud Charged.

Before this extraordinary remedy is resorted to, the party obtaining it should have proof upon which to base this action, and the court, in hearing and determining such a question, ought to be well satisfied, from the testimony, of the existence of the fraud charged.

APPEAL FROM SHELBY CIRCUIT COURT.

March 2, 1872.

OPINION BY JUDGE PRYOR:

The court very properly refused to permit the appellants to file an amended answer. The statements of James White upon his examination by appellee's counsel made him liable for the debt although the recovery against him as surety was barred by time.

Himself and brother had received an estate from their father more than sufficient to pay the appellees debt, and were liable for that reason. The attachment, however, should not have been sustained. The only proof introduced upon this subject, was in substance that the appellants had but little, if any, estate, and that an attachment had been levied upon two mules about one year prior to the trial of this case in favor of one Baskett and the mules sold. That on the day or about the time Baskett's attachment issued the appellants were in the possession of four mules and only two of them were found. Before this extraordinary remedy is resorted to, the party obtaining it should have some proof upon which to base this action, and the court in hearing and determining such a question ought to be well satisfied from the testimony of the existence of the fraud charged. The claim of the appellee is no doubt meritorious, and the appellants have doubtless squandered an estate that ought to have been applied at least a part of it to the payments of their father's debt, but this record presents no such state of facts as authorized the court below to sustain the attachment.

Opinion of the Court.

The judgment is reversed, only so far as it sustains the attachment and the cause remanded with directions to the court below to discharge the attachment and for further proceedings consistent with the opinion.

Judge Peters not sitting.

B. Twyman, A. G. Roberts, for appellants.

Harwood, for appellee.

THOS. HIGGINS *v.* C. S. STOY.

Cost—Vexatious Litigation—Each Party to Pay His Own Cost.

Where the proceedings are vexatious upon the part of both litigants, and neither succeeds, each party should pay his own cost.

APPEAL FROM MARION CIRCUIT COURT.

December 6, 1870.

OPINION BY JUDGE LINDSAY:

Stoy filed his petition in the Marion Circuit Court claiming to be the owner and possessor of a certain house and lot in the town of Lebanon, and alleging that the eastern wall of his said house was about nine inches within the boundary of his said lot, and that Higgins who owned the adjoining lot to the east, had, without his consent, and of force entered upon his said premises, and attached planks, joists and rafters to his said eastern wall by driving nails through the same into said wall, and he prayed for judgment for the recovery of said nine inches of land, and for five hundred dollars damages for trespass. Appellant moved to strike out that part of the petition setting up the trespass which motion was overruled.

Wherefore he filed his answer denying that Stoy owned the house and lot, or was rightfully in possession of the same, or that the eastern wall of the house was within the boundary of the lot, also that he had forcibly entered upon said premises or had attached and continued to keep rafters, etc., attached to the wall of the house, or that any portion of Stoy's lot was in his possession.

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He also made his answer a cross-petition and prayed judgment against Stoy on account of an alleged Trespass upon his lot and building.

Upon trial, the jury returned a verdict in these words: "We, of the jury, find the wall the property of Stoy, and that Higgins has a right to the use of said wall as far back as his brick house goes, beyond that the wall is exclusively said Stoy's, and that Higgins has committed no trespass." Upon the verdict the court rendered a judgment settling the rights of the parties in and to the property in controversy in exact accordance with the finding of the jury, and adjudging Higgins to pay the costs of the action.

In this, so far as the cases are concerned, we think the court erred. It cannot be concluded from the verdict. That Higgins was guilty either of the unlawful possession of any portion of Stoy's lot, or of the trespass complained of, nor that Stoy was guilty of the trespass complained of by Higgins in his cross-petition.

We conclude that the proceeding was vexatious upon the part of both litigants, and as neither succeeded, that each party should pay his own costs.

The judgment is therefore reversed and the cause remanded, with directions to the circuit court to enter a judgment in conformity with this conclusion.

Harrison & Russell, for appellant.

Rountree & Fogle, for appellee.

J. W. HAZELRIGG v. J. T. WILLIAMS.

Vendor and Purchaser—Title Bond—Specific Performance—Purchase Money Must Be Paid Before Deed Is Made.

In equity a vendor can not be forced to convey, in conformity with his title bond, until he is paid the full amount of the agreed purchase price for the real estate sold.

Judicial Sale—Encumbered Property—Necessary Parties—Resale.

The fact that the property did not sell for an amount sufficient to satisfy the prior lien does not prove that, upon a second sale, after the rights of all the parties shall have been adjudicated, and bidders

Opinion of the Court.

can be assured that the title they are asked to take can never be disturbed, a larger amount may not be realized.

It is a universal rule of equity that encumbered property shall not be sold until all the parties having claims upon the same are before the court.

APPEAL FROM MORGAN CIRCUIT COURT.

April 13, 1871.

OPINION BY JUDGE LINDSAY:

The legal title to the town property remained in Williams, even after he surrendered the note of Tutt, and accepted in lieu of the same the note executed by Taulbee. By this transaction he accepted the personal undertaking of Taulbee instead of that of Tutt, but in equity he cannot be forced to convey in conformity with his title bond until he received the full amount of the agreed purchase price for the real estate sold by him to Tutt. "The circuit court therefore correctly adjudged that the lien of Williams was superior to that of Hazelrigg."

Still, as Hazelrigg had a lien upon the same property, to secure the payment of his debt, and as Williams fails to deny that he had knowledge of that fact, at the time of the institution of his suit, Hazelrigg had the right to object to the confirmation of the sale made under the judgment in favor of Williams, and to ask that the property be resold to satisfy both of their debts.

It is true the property did not sell for an amount sufficient to satisfy the judgment of Williams but the fact does not prove that upon a second sale, after the rights of Hazelrigg shall have been adjudicated, and bidders can be assured that the title they are asked to take under the proposed sale can never be disturbed by him that a much larger amount may not be realized.

It is a universal rule of equity, that encumbered property shall not be sold, until all the parties having claims upon the same are before the court.

Williams should have made Hazelrigg a party to the suit. He having failed to do so, the latter had a right to interplead, and as he *done* so before, the sale under the judgment of Williams was confirmed. The same should have been set aside, and the property resold to satisfy the claims of both parties.

Opinion of the Court.

Wherefore the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Scott, for appellant.

Cooper, for appellee.

J. HILL v. E. A. MORRIS.

Forcible Entry and Detainer—Forcible Detainer—Possession Obtained by Purchase—Possession Obtained as Tenant.

The appellant entered under a contract as tenant with the privilege to purchase the land by paying the specified sum on the day named, and, failing to comply, he thereby elected to hold as tenant, and, having refused to surrender possession at the end of the year, he subjected himself to be proceeded against as a forcible detainer.

APPEAL FROM HICKMAN CIRCUIT COURT.

January 9, 1871.

OPINION BY JUDGE PETERS:

Appellee having succeeded in the circuit court on a traverse to that court in a proceeding for a forcible detainer, appellant has brought the case to this court for revision.

It appears from the evidence that in January, 1869, the parties to this controversy entered into an alternative parol contract by which appellants agreed to pay appellee \$800 for the land, \$175 of which he was to pay on or before the 1st of March, 1869, and if he failed to pay said sum on that day he was to hold and occupy the land as tenant of appellee and pay him \$100 for one year's rent, and having failed to pay the money stipulated to be paid on the first day fixed and refused to surrender possession at the end of the year to appellee, this proceeding was instituted.

It is insisted on the authority of *Jack v Carneal*, 2 A. K. Mar. 519, that this proceeding cannot be maintained. In that case Jack, having been dispossessed of the land by a writ of *habere facias possessionem*, entered into a contract with Carneal for the purchase of the land in contest, and having continued in possession under the contract for some time, the parties finally by

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mutual consent cancelled the contract, and Jack took a lease from Carneal for the land, and at the end of the lease, Jack having refused to restore the possession, Carneal caused to be issued from a justice of the peace a warrant for a forcible detainer, and the court held that Jack having entered under the contract to purchase, could not have become thereby Carneal's *tenant* so as liable to be proceeded against as a forcible detainer, and the case of *Hays v. Connel's heirs*, 1st Mar. 393, is referred to as sustaining that doctrine, and the court concludes that it is only when the possession is obtained by the defendant as *tenant*, that he can be adjudged guilty of forcibly detaining the premises by refusing to restore the possession.

In this case it can not be said that appellant entered under a contract to purchase, but it was from the evidence rather an entry as a tenant with the privilege to purchase the land by paying the specified sum on the day named and, having failed to comply, he elected to hold as *tenant* and, having refused to surrender possession at the end of the year, as from the evidence, he contracted to do, he subjected himself to be proceeded against as a forcible detainer. As the instructions of the court below conformed to these views they were not erroneous, and the judgment must be affirmed.

Judge Lindsay did not sit in this case.

Bullock, for appellant.

Lindsey for appellee.

JAMES W. HUNT v. WINCHESTER & RED RIVER IRON
WORKS T. R. Co.

Corporations—Subscription to Stock—Misrepresentation—Change of Location of Turnpike.

The allegations of fraud and misrepresentation are not sustained by the evidence. The appellant's own witness proves that the road was located at the time as Goff said it was, and it was the agreement of the parties that Hunt would waive his right to compensation for the road bed taken if the road should be located through his land, that he afterwards changed his mind as to damages, and that caused the change in the location. This was not such a change as would affect the right of a subscriber to the capital stock.

Opinion of the Court.

APPEAL FROM CLARK COUNTY CIRCUIT COURT.

April 11, 1871.

OPINION BY JUDGE PETERS:

Appellee brought this action on a writing signed by appellant in the following language. We, whose names are hereunto subscribed, promise to pay the board of managers of the Winchester and Red River Iron Works Company one hundred dollars for every share of stock set opposite our names in such manner and proportions, and at such times as shall be determined on by said board, and agreeable to an act of Assembly incorporating said company.

Appellants' defense is contained in an answer of five paragraphs, in substance as follows:

1. That he was induced to sign the paper sued on by the fraud, Covin, and misrepresentation of John H. Goff, the plaintiff's commissioner to procure subscriptions for stock, its agent and president.

2. That he signed said writing upon the statement of said Goff that the turnpike road was located, and would be built in part upon the line between Jeptha Hunt, and the widow Cooper, and through, and upon the land of Oliver Evans, etc., and that said turnpike road would remain so located and appellant confiding in that statement of said Goff subscribed for one share of stock in said company, which he would not otherwise have done.

3. That it was greatly to the interest of his father and of himself that the road should be located as it was represented by Goff it had been.

4. That plaintiff, in order to induce him to sign said writing, represented that said road was located as aforesaid.

5. That plaintiff well knew that he subscribed for said stock because he believed the road was located as aforesaid and that after he subscribed for said stock plaintiff changed the location of said road, which change was to his injury, opposed by him, and he therefore denies that said writing is obligatory on him.

It is not necessary to decide whether the parol statement of Goff made at the time appellant signed the writing sued on, were competent evidence to add to and change the contract as

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evidenced by the writing is not a question before us, as they were admitted without objection; and appellant had nothing to complain of on account of the rejection of evidence.

The court below gave but one instruction to the jury, and that as asked for by appellant; slightly modified by striking out therefrom the word "fraudulent" before the words "Statement of John H. Goff" and before the words "Representation of said Goff," and to these modifications he excepted. That qualification was altogether proper, because if it had not been made, the court would have assumed to decide a material fact, which it was the province of the jury to decide.

The allegations of fraud, and misrepresentations are not sustained by the evidence, the appellants' own witnesses prove that the road was located at the time and as Goff said it was, and the evidence tends to show that it was the agreement of the parties that Jephtha Hunt would waive his right to compensation for damages for his land taken by appellee, if the road should be located as Goff represented it was, that he afterwards changed his mind as to compensation, and that caused a change of the location of the road.

Perceiving no error in the proceeding prejudicial to appellant the judgment must be affirmed.

Huston, Simpson, for appellant.

Breckenridge & Buckner, for appellee.

E. N. GARDNER, ETC., v. D. B. FORBES, ETC.

Banks and Banking—Accommodation Endorsers—Sureties—Endorser Induced by Bank to Part with Property of Principal—Answer—Demurrer.

Taking the allegations of the answer as true, which is done for the purpose of the demurrer, and regarding the president of the bank as acting officially and as agent of the bank, in the alleged communications by him to the appellants, to the effect that the principal debtor had in some way secured the bank whereby the endorser was induced to part with the property by which they were indemnified, they would be discharged from liability to the bank. Consequently it was error to sustain the demurrer.

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APPEAL FROM CALLOWAY CIRCUIT COURT.

December 14, 1870.

OPINION BY JUDGE PETERS:

In the answer of appellants, which was permitted to be filed by the court they allege that they endorsed the bill sued on for the accommodation of Hardy & Co., the principal debtors, and that the bank, by its officers, and for which appellee sues, knew the fact, when it purchased the bill, that its president attended the June term, 1866, of the Calloway Circuit Court, and then informed appellants that Hardy, the principal debtor, had paid the greater part of the bill, and had made satisfactory arrangements to pay the residue thereof, that it was, in fact, satisfied. That they had instituted suit against said Hardy with attachment, and had their attachment levied on the property of said Hardy sufficient to indemnify and secure them, but upon the assurance of the bank's president that it was indemnified by Hardy, and it was unnecessary further to prosecute their suit against him, they dismissed their said suit, and released his property which they had attached.

Taking these allegations as true which is done for the purposes of the demurrer and regarding the president as acting officially and as agent for the bank in the communication by him, these debtors of the bank were in some way secured by the principal debtor, and if the bank parted with the security, or induced the endorsers, who were mere sureties of Hardy & Co., to give up the property of their principal by which they were in whole, or in part indemnified, they would be discharged at least to the value of the securities which they had possessed themselves of.

Consequently the demurrer to that part of the answer was improperly sustained. Nor is the error cured by the evidence of appellee tending to disprove these allegations of the answer, for appellants could not offer evidence to sustain those allegations, after the answer had been adjudged bad on demurrer, and if appellee had the evidence to disprove them, it was indiscreet to risk the demurrer.

As to the admissibility of the evidence, there were no exceptions taken to the opinion of the court overruling appellants'

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objections to it, if, in fact, any were made. All the evidence except the law of Louisiana, the bill and notary's certificate of protest, is in depositions, and no exceptions were filed to them. So that even if there had been any error in the court below in admitting testimony, this court could not consider it.

No bill of exceptions was filed incorporating the rejected answer in the record, and we cannot recognize the paper copied as that answer, since the unofficial statement of the clerk does not make it a part of the record.

But for the error in sustaining the demurrer to that part of the original answer herein referred to the judgment is reversed, and the cause is remanded with directions to overrule it, and for further proceedings consistent herewith.

Bush, Stubblefield, Brown & Miller, for appellant.

Tice & Campbell, for appellee.

JAMES GUTHRIE'S EX'ORS. *v.* JAMES STEVENS, ETC.

Appeals and Errors—Second Appeal—Former Appeal—Law of the Case.

On the second appeal the law as expounded on the first must prevail as to the questions involved.

Municipal Corporations—Presumption as to Ordinance.

An ordinance passed by a city council must be presumed *prima facie* to have been passed in accordance with the charter.

Municipal Corporations—Improvement of Streets—Lien—Personal Judgment.

As the statute gives to the appellee a lien on the property improved for the cost of improving it, and as that is the only relief sought, and the only remedy to which he is entitled, it was error to render a personal judgment against appellant.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 15, 1871. Reversed, 1871. Modified, May 25.

OPINION BY JUDGE PETERS:

This case has heretofore been before this court, and the opinion then delivered, and the law as therein expounded must prevail in the final determination of the questions involved. It was then

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decided that the facts set forth on the original and amended petitions constituted a good cause of action against appellants testator, and as the allegations thereof are sustained by the ordinances passed by the city council exhibited which must be presumed *prima facie* to have been passed in accordance with the charter of the city and the evidence. We concur in opinion with the chancellor that appellants failed to make out an available defense to the suit. But as the statute gives to the appellee a lien on the property improved for the cost of improving it, and as that is the only relief sought, and the only remedy to which he is entitled under a proceeding of this character, we are constrained to the conclusion that it was error to render a personal judgment against appellants, when the judgment should have been to subject the property improved to the payment of the claim. (See A. B. M. 575.)

Wherefore the judgment is reversed, and the cause remanded with directions to render a judgment subjecting the property of appellants opposite the improvements to sale to pay the amount assessed against them for the cost of said improvement with interest and the cost of the suit, and for further proceedings consistent herewith.

Coke, for appellants.

Sherman, for appellees.

GIVEN WATTS & CO. v. JEROME WATSON & CO.

Bankruptcy—Assignee Holds for Creditors.

An assignee of a debt in bankruptcy holds same for the benefit of all the creditors of the bankrupt.

APPEAL FROM HENDERSON CIRCUIT COURT.

April 24, 1871.

OPINION BY JUDGE PETERS:

It seems to this court that the facts stated in the reply of the assignee in bankruptcy of Given Watts & Co., and these stated in the petition in U. S. District Court to set aside the certificate

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of discharge of appellee Watson in bankruptcy, entitled appellants to a continuance of the cause, and also fully authorized the court to make them party plaintiffs in the suit, as they held the legal title to the debt, if any existed, for the benefit of the creditors of Given Watts & Co.

The court therefore erred in refusing to permit said assignees to be made parties to the suit, and in overruling the motion of appellants to continue the cause and in dismissing the petition.

Wherefore the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Turner, for appellants.

Bush, for appellees.

IRVINE T. GREEN *v.* WM. PULLINS.

Partnership—Settlement—Written Memorandum.

The written memorandum of the settlement of a partnership, executed by both parties, is *prima facie* a full settlement of all the accounts between the parties at the time the paper was signed.

APPEAL FROM MADISON CIRCUIT COURT.

December 17, 1870.

OPINION BY JUDGE LINDSAY:

The written memorandum of settlement executed by both parties, as well as other circumstances developed, by the record satisfy us that all accounts between them growing out of the partnerships during the year 1866 were fully settled at the time said paper was executed.

The demurrer to Green's cross action for the \$210 was properly sustained, and as he failed to amend, he must be taken to have abandoned the further prosecution of the same. Green's claim for excess corn furnished in 1866 was evidently embraced in the settlement of the accounts of that year before referred to, hence his claim to the entire corn crop raised in 1867 was unfounded.

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We think he received all the credits to which the proof showed he was entitled, and that the judgment in favor of Pullin is correct.

Judgment *affirmed*.

Judge Hardin did not sit in the case.

Turner & Scott, for appellant.

Caperton, for appellee.

GEO. B. HODGE *v.* E. H. MORIN & Co.

Pleadings—Answer—Denial—Want of Knowledge or Information.

The defendant must deny all the allegations of the petition which he intends to controvert, and in addition thereto he must deny any knowledge or information of said allegations sufficient to form a belief as to their truth. A want of knowledge or information is not sufficient.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 25, 1871.

OPINION BY JUDGE PETERS:

The petition in this case consists of one short paragraph in which the plaintiffs allege that the defendant is indebted to them in the sum of seventy dollars and fifty cents for balance due on livery bill, particulars of which are set out in an account filed with the petition.

By sub-section 2 of section 125, Civil Code, it is provided that the answer shall contain a denial of each allegation of the petition controverted by the defendant or of any knowledge, or information thereof sufficient to form a belief. In the 1st paragraph of the original answer appellant admits he is indebted to appellees in some amount on the livery bill filed, but he says he has no knowledge or information sufficient to form a belief as to the amount thereof. Paragraph 2 presented no defense to the action and in the 3d he says he has no knowledge, or information sufficient to form a belief as to the correctness of the

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account sued on, except certain items in the account, sufficiently named, to the original answer a demurrer was sustained, and on leave given an amended answer was filed or rather it professes to be an amendment to the 2d paragraph of the original, in which appellant says as to the several items in the account filed save and except certain charges therein designated by their respective dates, he says he has no knowledge, or information sufficient to form a belief. A demurrer was also sustained to this amendment, and appellant failing to answer further judgment was rendered against him for the amount claimed. By the Sec. *supra*. The defendant must deny all the allegations of the petition which he intends to controvert, and in addition thereto he must deny any knowledge, or information of said allegations sufficient to form a belief of their truth. In this case appellant wholly fails to make a general denial of the allegations of the petition, but places the defense on his want of knowledge or information, which is not sufficient, and especially in connection with the first paragraph of the answer, in which an indebtedness is admitted.

Wherefore the judgment is *affirmed*.

J. R. Hallan, for appellant.

———, *for appellee.*

STEPHEN GLESS, ETC., v. ALLAN M. SNOOKS, ETC.

Contracts—Procurement by Fraud—General Rule as to Recovery on—Performance—Ratification.

As a general rule the guilty parties can take nothing under a contract procured to be made by and through their fraud. But if the contract be performed in whole or in part, and the other parties ratify and confirm it, by receiving and enjoying the money or property received under it, and by suit recover and collect in addition thereto such damages as they may have sustained by reason of the fraud of their adversaries, every principle of justice demands that the latter should have a right of action against them for at least that portion of the consideration actually paid.

Set-off and Counter-Claim—Set-off Complete Cause of Action and Need Not be Pleaded in an Action for Damages.

The agreed price of the hogs might have been pleaded as a set-off to Glenn's claim for damages, but as it constitutes a cause of action complete within itself, appellees were not bound to plead it.

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APPEAL FROM SHELBY CIRCUIT COURT.

May 1, 1871.

OPINION BY JUDGE LINDSAY:

From an examination of the record in the case of *Glenn, etc., v. Snook, etc.*, it is evident that as to the 98 stock hogs sold and delivered by the latter to the former, at the agreed price of \$719.50, such of them as did not die from cholera were received by the present appellants and converted to their use and benefit, and that in said action they recovered as part of their damages the value of such of said hogs as did die.

In the petition they specifically claim damages on account of the loss of a portion of said hogs, and when Snooks, etc., deny all fraud, and all responsibility, they do not controvert the fact that said 98 hogs were the property of appellants, nor that they were entitled to recover for their loss, if entitled to recover at all. The court instructed the jury to this effect, and it is not to be presumed that the jury, after finding that Snook, etc., had perpetrated the fraud complained of, disobeyed the instructions of the court, and refused to find for damages that were not controverted. The court below, therefore, did not err in its peremptory instructions in favor of appellees, unless, first, the fraud of appellees violated the contract to such an extent as to prevent them from recovering anything upon any claim growing out of it, under any state of case; or, second, that the judgment in the case of *Glenn v. Snooks, etc.*, is final and conclusive as to all questions or claims growing out of or in any way connected with said contract; or, third, unless the court erred in refusing to let the appellants prove by jurors what matters were intended to be settled by the verdict in said action. As a general rule the guilty parties can take nothing under a contract procured to be made by and through their fraud. But if the contract be performed in whole or in part, and the other parties ratify and confirm it, by receiving and enjoying the money or property received under it, and thus by suit recover and collect in addition thereto such damages as they may have sustained by reason of the fraud of their adversaries. Every principle of justice demands that the latter should have a right of action against

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them for at least that portion of the consideration actually paid. In his case the defrauded parties retained and converted to their own use such of the stock hogs as did not die, and recovered in their action for the value of such as did die, as well as for all other damages sustained by them in consequence of their fraud complained of, and now to permit them to refuse to pay the appellees the agreed value of said stock hogs would be to assist them in perpetrating a fraud upon their vendors, who, however guilty they may have been, have been compelled to atone fully for their fraudulent conduct. We do not regard the judgment in the case of *Glenn, etc., v. Snooks, etc.*, as a bar to this action. It is true the agreed price for the stock hogs might have been plead as a set-off to Glenn's claim for damages, but as it constitutes a cause of action complete within itself, appellees were not under the Code of Practice bound to plead it, and as they did not do so, they have the right to recover on the same in this action. We do not deem it necessary to decide whether or not it was admissible to show by jurors what matters were settled by the verdict in the case of *Glenn v. Snooks*. The bill of exceptions does not show what the jurors would have sworn had they been allowed to testify, but only what that evidence would have conduced to establish. A mere conclusion of law, of the correctness of which this court has no means of determining. We perceive no available error in the record.

Judgment affirmed.

Lindseys, Bullock & Davis, for appellants.

Harwood, for appellees.

W. W. HANLEY v. A. J. WHIPPS.

Judicial Sale—Written Assignment of Bid—Conveyance by Commissioner to Assignee—Contract Performed.

Where a purchaser at a judicial sale assigns his bid to another, the contract is fully performed upon the execution of the conveyance by the commissioner to the assignee.

APPEAL FROM KENTON CIRCUIT COURT.

May 9, 1871.

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OPINION BY JUDGE LINDSAY:

Hanley and Whipps bought jointly at commissioner's sale on the 24th of February, 1868, lot No. 134, in the City of Covington. On the 23d day of the following April, Hanley executed and delivered to Whipps the following writing:

"To the Commissioner Wallace, and Court of Kenton County, Ky., I surrender to A. J. Whipps my interest in above property upon his paying the purchase bond, and request that title be made to him. Covington, April 23d, 1868.

Signed, W. W. Hanley."

Accordingly on the 3d of April, 1869, the court's commissioner, under the direction of the court, did make a conveyance of said lot to Whipps. In the meantime Hanley by purchase from one Kearney had become the owner and was in possession of the adjoining lot No. 135.

On the 9th of January, 1869, Whipps brought this suit in equity, basing his right to belief upon the writing about quoted, and alleging that Hanley by the execution of the same had undertaken to transfer the title and possession of the lot No. 134 to him, but that under his purchase from Kearney he had come into possession of a strip of said lot fronting 16 inches on Garrard Street and running back 110 feet, and that he refused to surrender said strip in pursuance of his written obligation. He prayed for a specific execution of said written contract and that Hanley be compelled to surrender the 16 inches in controversy. Hanley by his answer, denied that he was in possession of or claiming any part of lot No. 134, or that any portion of the land held or possessed by him was owned by Whipps.

Under their purchase at the commissioner's sale in the case of Lee vs. Southgate, the parties acquired the right to such title to lot No. 134 as was vested in the parties to that proceeding. Hanley upon condition that Whipps would pay the entire purchase price relinquished to him, such interest therein as he had acquired under their joint purchase, and when the commissioner conveyed the lot to Whipps, the contract was fully executed upon the part of Hanley.

This conveyance passed to Whipps the title of the Southgate heirs to said lot and this was all he contracted for.

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At the time of the joint purchase, Kearney, who then owned lot No. 135 was in possession of the 16 inches of land in controversy, claiming it as his own and adversely to the Southgate heirs and that fact was known to both Whipps and Hanley, and Hanley did not attempt to pass nor did Whipps expect to acquire from him by his said relinquishment any title or right whatever to the land then possessed by Kearney. Hence it was no breach of Hanley's obligation for him to purchase from and enter upon said land and hold under Kearney, and he can not be compelled to surrender any part of the land he thus acquired, by a proceeding in equity for a specific performance of a contract which the record shows was fully executed before the hearing in this case and as soon as Whipps had paid the purchase money for the lot, and placed himself in a position to demand its execution.

If Whipps can recover at all in this proceeding, it must be as in an action of ejectment upon the strength of his own title. Excluding the depositions of Kearney and Laidley who are claimed to be incompetent witnesses, it appears that Whipps has now in possession a lot fronting on Garrard Street $47\frac{1}{2}$ feet, the exact front to which he is entitled. It is claimed, however, and there is proof conducing to show that he has within his inclosure about 16 inches of an alley, and that this accounts for his having in possession a front equal to the full front of his lot. This fact is ascertained if at all by the surveys made at different times. The difficulty attending these surveys is the fact, that no ancient monuments fixing the corner of a neighboring square, or street, or lot could be found and identified as such. Certain curb marks are spoken of by the surveyors, but neither of them know, nor does tradition establish when and by whom, and for what purpose they were made. Some of the old fences and buildings in the neighborhood, which are presumed to have been built upon the lines of the street and alleys, seem to corroborate the opinions of the surveyors, but there are other buildings and fences equally ancient, which conform exactly to the lines as claimed by Hanley. In addition to this it is certain that for more than fifteen years before this controversy arose, Kearney and those under whom he claimed had held and claimed the 16 inches in contest as part of lot No. 135.

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Southgate, who erected the brick dwelling house many years ago upon lot No. 134, built its north wall exactly upon what is now claimed to be the north line of said lot. He permitted the owners of lot No. 135 to hold up to the wall of his said house, and he and his grantees must have known of the claim being asserted by the owner of said lot. For many years past this property has been valuable, and it is by no means probable that the owner of lot 134 would have permitted his neighbors to hold and claim 16 inches of their front without taking some steps to assert and quiet their title. Nor is it probable that in the erection of a valuable and substantial house, Southgate would have carelessly permitted one of the walls to have been placed within 16 inches of the boundary. So close as to render valueless the strip left, and far enough away to materially diminish his front upon the street.

Considering such evidence only as is undoubtedly competent, we are of opinion that the preponderance is decidedly in favor of the proposition that the north wall of the house on lot 134 is on the north line of said lot, and hence that the appellee has failed to establish his right to recover.

Wherefore the judgment of the circuit court is reversed and the cause remanded with instructions to dismiss the appellee's petition.

Benton, Stevenson & Myers, for appellant.

Menzines & Furber, for appellee.

M. C. HOWARD, ETC., v. E. M. PETERS, ETC.

Bills and Note—Husband and Wife—Credit Given Wife—Husband Insolvent.

Where the credit is given to the wife and she joins with her husband in the execution of a note, a recovery may be had against her, especially where the husband is insolvent.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 3, 1871.

Opinion of the Court.

OPINION BY JUDGE PRYOR:

The note in controversy was executed by the husband and wife for the labor of the obligee in building or furnishing brick out of which a dwelling house was erected on the land of the wife. The husband was insolvent and a home was necessary for the shelter and comfort of the family. The amount charged is only eighty dollars. The credit was given to the wife, and she appears as principal in the note. We perceive no reason for disturbing the judgment of the court below and the same is affirmed.

Ray, for appellants.

Little, for appellees.

KENTUCKY INS. CO. v. F. H. GREEN.

Insurance—Loss—Action to Enforce Collection—Petition—Necessary Allegations—Preliminary Proof.

Appellee's petition, after setting out the policy of insurance and the loss of the property insured, states "that the agent of the said company is now here and refuses to pay the plaintiff the said amount as the said company was bound to do by said policy."

The company was therefore not estopped from insisting that the appellee should comply with the stipulations of the policy. According to the face of the instrument, the loss was not due for ninety days after the preliminary proof was made. The petition presents no cause of action.

APPEAL FROM GRAVES CIRCUIT COURT.

December 7, 1870.

OPINION BY JUDGE LINDSAY:

Appellee's petition after setting out the policy of insurance and the loss of the property insured, states "that the agent of said company is now here and refuses to pay plaintiff the said amount, as the said company was bound to do by said policy."

It is insisted that this refusal brings this case within the doctrine laid down by this court in the case of the Manhattan Insur-

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ance Company v. Stein & Zing., 5 Bush 652, and that appellee therefore had the right to sue without making or offering to make the preliminary proof necessary for an adjustment of the loss, as required by the policy. It does not appear from the petition, except by inference that the agent alluded to had authority either to adjust or pay the loss, nor does it appear that appellee offered to prove the preliminary facts, nor that the agent refused to acquaint him with the mode or character of proof required, nor that he lulled him by assuming that he would not be paid even though he complied with all the conditions of this policy.

The company was therefore not estopped from insisting that appellee should comply with the stipulations of the policy. According to the face of that instrument the loss was not due and payable for ninety days after the preliminary proof was made and deposited with the secretary of the company.

Appellee not only failed to make such proof, but brought his suit on the 23d day after the loss occurred. He certainly had no claim against the insurance company that was due and payable at that time, hence his petition presented no cause of action.

Wherefore the judgment is reversed and the cause remanded for further proceeding consistent herewith, appellee should be allowed to amend his petition in case he denies to do so and the insurance company to answer.

Harlan & Barrett, for appellant.

Bush, for appellee.

B. M. JONES v. R. M. ROBINSON, TRUSTEE.

Judicial Sales—Irregularities Not Effecting Substantial Right Not Sufficient to Set Aside Sale.

Irregularities which do not affect the substantial rights of the parties are not sufficient to set aside a sale made under a judgment where the confirmation is made without objection.

Judicial Sales—Commissioner Trustee for Debtor—Exemptions—Partition.

In view of the fact that the court's commissioner was the trustee selected by the debtor to sell his estate and apply the proceeds

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to the payment of his debts, it was not improper that he should be intrusted with the duty of setting apart to the heirs and distributees of the debtor such property as was exempt from execution, nor that he should be permitted to make a division of the land.

APPEAL FROM GARRARD CIRCUIT COURT.

December 8, 1870.

OPINION BY JUDGE LINDSAY:

The failure of the court, in the judgment complained of, to give at least some general directions as to the time of the sale of the real estate was doubtless an irregularity. It was also irregular to direct the personal property to be sold upon a credit of six months instead of three months.

But the record before this court shows that appellant did not object to the confirmation of the sale of the real estate made under said judgment and that the notes executed for the personal property fell due before he was entitled to receive any part of the proceeds of the sale upon his claim. We conclude that his substantial rights were in no wise prejudiced by either of said errors.

Although the judgment did direct the commissioner to collect the sale notes, and did not as it should have been done require him to execute the bond prescribed by the statute, yet it appears that immediately after the confirmation of the sale, and before any portion of the bonds had been collected, the commissioner was required by the court to execute the prescribed bond, and that he did in point of fact do so.

In view of the fact that the court's commissioner was the trustee selected by the debtor to sell his estate and apply the proceeds to the payment of his debts, and that it was only necessary for him to apply to the chancellor in order to be enabled to pass a perfect title to the property sold. We do not think that it was in this particular case improper that he should be entrusted with the duty of setting apart to the heirs and distributees of the debtor such property as was exempt from sale under execution, nor that he should be permitted to exercise his own judgment in the division of the lands prior to the sale.

Any abuse of such power or discretion could, and doubtless

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would have been corrected by the court, upon the motion of either one of the parties in interest. The fact that neither the appellant nor any other creditor objected to the confirmation of the division and sale of the land which by reason of the approval of the court was in point of fact its own act, inclines us to the conclusion that there was no abuse of discretion on the part of the commissioner.

We are of opinion that none of the errors or irregularities complained of by appellant injuriously affect his substantial rights, and the judgment of the court below is therefore affirmed.

Bradley, for appellant.

Dunlap, for appellee.

THOS. HUTCHISON v. SARAH AKIN, ETC.

Vendor and Purchaser—Reservation for Street—Contingency, Action to Enforce—Necessary Allegations.

The appellee took the strip of land subject to the contingency, that when Ford dedicated 25 feet of land on the same line to a street, she would dedicate the same quantity to the same purpose. It is not alleged that the said strip had been appropriated to the street or that appellant was not in the possession and enjoyment of the land at the time he filed his cross-petition; to that extent, therefore, he shows no grounds for relief.

Cemeteries—Sale of Land—Rights of Ingress and Egress—No Reservation Required.

The appellant knew the graveyard was on the land when he purchased it, and, being there, the law, without any reservation and inhibition in the deed, prohibits him from removing the stones that mark the resting places of the dead, buried there, or injuring and removing the inclosure around the graveyard, and compels him to permit the relatives of those buried there to exercise the right of ingress and egress.

APPEAL FROM BOYLE CIRCUIT COURT.

January 31, 1871.

OPINION BY JUDGE PETERS:

In Ford's deed to Graham he conveys the whole tract, and the title to the strip of land 25 feet wide, on the northern boun-

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dary passed to Graham, he bound himself, however, to dedicate that strip 25 feet wide, on condition that Ford dedicated a like quantity along said boundary for a street also. In like manner Graham in his deed to Mrs. Akin conveys said strip of land 25 feet wide to her, on the condition that she would dedicate the same to a street as provided for in Ford's deed to him. It is therefore a mistake to say Mrs. Akin had no title to this strip of land; but she took it subject to the contingency that when Ford dedicated 25 feet of land on the same line to a street, she would dedicate the same quantity to the same purpose. And the appellant wholly failed to allege that said strip had been appropriated to the street or that he had not gotten the possession and was not in the enjoyment of said land at the time he filed his cross-petition. To that extent therefore he shows no grounds whatever for relief.

As to the graveyard it is very evident that appellant knew it was on the land when he purchased, and being there the law without any reservation, and inhibition in the deed, prohibits him from removing the stones that mark the resting place of the dead buried there, or of injuring and removing the inclosure around the graveyard and compels him to permit the relatives of these buried there to exercise the right of ingress and egress to and from said graveyard on proper occasions and for proper purposes. 1 vol. R. S. pp. 412, 413. So that on neither of the grounds named has appellant any just cause of complaint. Wherefore the judgment is affirmed.

James, Harding, for appellant.

Porter, Thompson & Daviess, for appellees.

WM. H. HUGHES v. A. G. HUGHES, ADMR., ETC.

Liens—Mere Deposit of Title Papers Cannot Create.

The mere deposit of title papers cannot create a lien or operate as a mortgage in this country, as in England, to give one creditor preference over another.

APPEAL FROM GALLATIN CIRCUIT COURT.

May 18, 1871.

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OPINION BY JUDGE PETERS:

The statute provides expressly how real estate may be pledged for the security of a debt, and the mode therein provided must be pursued to give one creditor preference over others, and over subsequent purchasers.

A mere deposit of title papers cannot create a lien, or operate as a mortgage in this country, as in England, to give one creditor preference over others. If that were allowed the effect would be to give a fictitious credit to embarrassed debtors and to deceive those who might thereafter deal with them, and who knew nothing of the condition in which they had placed their property. This very evil the statute intended to prevent.

Judgment affirmed.

Winslow, for appellant.

Scott, for appellee.

E. J. GREEN v. JAS. R. SECREST.**Bills and Notes—Assignment—Usury.**

The written acknowledgment of appellee that all usury included in his individual debts to Green was stricken out in their settlement before the execution of the note sued on, is not contradicted by any testimony in the case, concludes him on that point.

APPEAL FROM KENTON CIRCUIT COURT.

December 10, 1870.

OPINION BY JUDGE LINDSAY:

As in all cases of usurious and illegal transactions, great difficulty attends the adjudication of the matters involved in the controversy. From the facts as presented by this record, we are inclined to the opinion that there is no error in the judgment of the court below except in so far as it credits the appellee with the amount he failed to realize upon the assignment of F. M. Secrest after the debts said assignment were intended to pay had been purged of usury. The court properly gave him

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credits by the amount of usury contained in said debts, viz: \$622.00. The evidence does not establish that the transaction by which appellees accepted said assignment and assumed to pay to Green the debts of F. M. Secrest was brought about by Green. Nor that he represented to appellee that F. M. Secrest was solvent and able to pay all his debts. It is certain that he did not assign the notes he held against F. M. Secrest to appellee, nor even pass them to him without assignment, but delivered them to the debtor himself.

We conclude that Green accepted the note of appellee in full payment of the debts he held against F. M. Secrest, and that appellee accepted the assignment of the notes on points because he hoped to be able now to obtain the money on said assignment, and because he secured time from Green, by the payment of usurious interest.

Under the circumstances we do not think that Green is in any way responsible to him on account of his failure to collect the whole of the amount assigned except in so far as he was prevented by reason of the usury contained in the notes surrendered by Green to F. M. Secrest.

As a legal sequence it follows that appellee was entitled to nothing on his own petition for costs and attorney's fees expended in the prosecution of his claim against F. M. Secrest.

The written acknowledgment of appellee that all usury included in his individual debts to Green was stricken out in their settlement before the execution of the note sued on, is not contradicted by any testimony in the case, and we think concludes him on that point.

We think the court properly refused to charge appellee with the \$270.00 of usury refunded by Green to F. M. Secrest, after the transaction by which appellee became responsible for the payment of the debts of said Secrest. There is nothing in the case to show that his payment was made with the knowledge or assent of appellee except the reply of appellants, which we do not regard in the light of a deposition.

The judgment is affirmed on the cross-appeal, but for the error indicated is reversed on the appeal and the cause remanded for further proceedings consistent with this opinion.

Carlisle, Pryor, for appellant.

O'Hara, for appellee.

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N. GRIEF v. A. MAKs, ETC.

Pleadings—Amendments—Lost Pleading.

The amended petition filed January 4, 1869, was still pending when the defendant offered to file his answer thereto and cross-petition, and as the matter of the lost pleading was such, if true, as to authorize the relief it sought, as a cross-petition as well as to constitute a defense to the plaintiff's claim to further relief than had already been adjudged. The court should have allowed the answer to be filed, although the plaintiff had dismissed his amended petition.

APPEAL FROM McCracken Circuit Court.

January 11, 1871.

OPINION BY JUDGE HARDIN :

The amended petition filed January 4, 1869, was still pending on the 20th of January, 1870, when the defendant, N. Grief, offered to file his answer thereto and cross-petition, and as the matter of the lost pleading, was such, if true, as to authorize the relief it sought, as a cross-petition as well as to constitute a defense to the plaintiff's claim to further relief than had already been adjudged. The court should have allowed the answer to be filed; and although before the action of the court in refusing to allow the answer to be filed the plaintiff dismissed the amended petition, yet as the action was still pending for some purposes, and further proceedings were required to complete the relief sought by the plaintiff, it would have been proper to permit the filing of the paper offered and rejected as a supplemental answer and cross-petition for vacating the judgment and sale to King and subsequent proceedings asked to be set aside on the ground and for the reasons disclosed, and the court erred in refusing to let it be filed. The clerk, who has failed to copy the amended petition, states that it is not on file, but does not explain why it is not, but it may be proper on the return of the case to require its production, on the motion of either party, if possible, or an explanation of its absence. This would seem to be due to the parties as well as to the clerk.

Therefore the judgment is reversed and the cause remanded with instructions to permit the answer and cross-petition to

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be filed, and for further proceedings not inconsistent with this opinion.

Yeiser, for appellant.

Bramlette, for appellee.

J. W. HENRY *v.* ANDERSON W. JONES, ETC.

Judicial Sales—Right of Heir to Redeem—Statute of Limitation.

The right to redeem the land was secured to his wife as well as to Pagett, and if she died before the expiration of the term, leaving her only heir an infant, the right passed to the heir, and her infancy saved the running of the statute. So even if it was a conditional sale, the appellee had a right to redeem the land, as it is alleged—and not denied in the answer—that Mrs. Jones was a minor when the suit was brought. The statute of limitations is no bar on account of the non-age of Mrs. Jones.

APPEAL FROM HARRISON CIRCUIT COURT.

May 25, 1871.

OPINION BY JUDGE PETERS:

Waiving the consideration of the question of the sufficiency of Mrs. Pagett's acknowledgment of the deed to pass her inheritance, we are satisfied that the transaction between Wm. Pagett and appellant was a contrivance of the latter to secure an enormous rate of interest for the loan of two hundred dollars by requiring four hundred dollars to be repaid within two years for the redemption of the land, and that the conveyance should be treated as a mortgage.

Two hundred dollars were advanced when the contract was entered into, to-wit, the 15th of January, 1851, and the privilege of redeeming the land was secured to Pagett in the writing by paying to Henry four hundred dollars at any time within two years, and if Pagett failed to pay the four hundred dollars within the two years, Henry was to pay him one hundred dollars more and have the land.

Before the time expired for the redemption of the land Mrs. Pagett died, and her husband then had at most but a life estate

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if he redeemed it, and at his death the land would pass to appellee, Louisa, the only child, and heir at law of his wife. The motive therefore to redeem with him might have been greatly weakened, and the chance to get to himself a hundred dollars more may have been an inducement to abandon the right to redeem altogether. His child and heir of his wife was an infant of tender years. She could not redeem although the right to do so was in her if her father failed to do it.

It is insisted that the price paid for the land at the date of the transaction was a fair and full consideration. If that be so why were four hundred dollars exacted as the price of redemption? There is but one solution of the question, and that is, appellant was determined to secure to himself an enormous rate of interest for his money, or hold the land.

The right to redeem the land was secured to his wife as well as to Pagett, and if she died before the expiration of the term, leaving her only heir, an infant, the right passed to the heir, and her infancy saved the running of the statute. So that even if it were a conditional sale the appellees had a right to redeem the land as it is alleged and not denied in the answer that Mrs. Jones was a minor when the suit was brought. So that in either aspect of the case the right of appellee is clear. The statute of limitation is no bar on account of the non-age of Mrs. Jones.

Wherefore the judgment is affirmed.

Hodges, for appellant.

A. H. Ward, J. S. Boyd, for appellee.

BERIAH M. JONES v. W. D. HOPPER, ASSIGNEE.**Judicial Sale—Confirmation—Re-sale—Final Judgment.**

The sale under Alford's judgment to enforce his lien was an unconditional and absolute sale of land not incumbered, after the legal title passed to Mayfield, and consequently not embraced in the provisions of Section 1, Article 15, Chapter 36, 1 R. S. 488, and that sale having been confirmed and a conveyance made to Jones for the land, his title to it was thereby perfected. This suit having been dismissed as to that portion of the land at a previous term of the court, that judgment being final, the court at a subsequent term had no power over it.

APPEAL FROM GARRARD CIRCUIT COURT.

January 17, 1871.

OPINION BY JUDGE PETERS:

Mayfield purchased the land in controversy from G. H. Alford and took a conveyance therefor, Alford reserving a lien in his deed for the unpaid purchase money. After the conveyance the purchaser thereof at \$300.

was made to Mayfield, executions against him were levied on the land and it was sold by the sheriff when appellant became

In January, 1868, Alford instituted suit against Mayfield to enforce his lien for his unpaid purchase money, recovered his judgment for a sale of so much of the land as should be required to pay him. The land was sold, and appellant purchased 195 acres at the sale, agreeing to pay the debt for that number of acres. This was subsequent to his purchase under the executions. The sale to Jones was confirmed, and a conveyance made to him by order of the court.

This suit was brought by Mayfield against Jones to be permitted to redeem the land by paying the money which Jones paid to Alford, and by refunding to him the \$300 he paid for the land at the sheriff's sale with interest thereon at the rate of ten per centum per annum.

On the trial of the cause in August, 1869, the court below dismissed the petition as to the 195 acres purchased by appellant at the sale made under the judgment in the case of Alford against Mayfield, as aforesaid.

At the October term, 1870, the court rendered a second judgment for a sale of "the land in the petition mentioned, and that B. M. Jones, the former purchaser of the equity under the two former sales have a lien upon the proceeds of sale for the amount of his purchase and the money paid by him." By the terms of this judgment it is apparent that the 195 acres purchased by Jones under the judgment foreclosing Alford's lien for his purchase money are adjudged to be sold as well as the residue of the tract. To the judgment for the sale of that portion of the tract there are two insurmountable objections: (1) The sale under Alford's judgment to enforce his lien was an unconditional and

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an absolute sale of land not encumbered after the legal title passed to Mayfield, and consequently not embraced in the provision of Sec. 1, Art. 15, Chap. 36, 1 R. S. 488, and that sale having been confirmed and a conveyance made to Jones for the land his title to it was thereby perfected. (2) This suit having been dismissed as to that portion of the land at a previous term of the court, that judgment being final, the court at a subsequent term had no power over it..

But as to the residue of the tract, Mayfield would have had the right to redeem it under Sec. 4, Art. 13, Chap. 36, p. 484, 1st Vol. R. S., by complying with the provisions of said section, but the allegation of the petition are insufficient to authorize the relief therein provided for.

Wherefore the judgment is *reversed* and the cause is remanded with directions to dismiss the petition.

Bradley, for appellant.

McKee, for appellee.

W. A. HOLLAND AND WIFE, ETC., v. THOS. F. CRUTCHFIELD,
STONE & Co.

Infants—Sale of Land Before Majority—Bond for Title After Arriving at Age—Surety on Bond Estopped to Claim Land.

Where an infant sells his land and executes a bond with security that he will make a perfect title when he arrives at twenty-one years of age, the surety in the bond is estopped to assert title to the land against the infant's vendor.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 1, 1872.

OPINION BY JUDGE PETERS:

On the original hearing the attention of the court was not particularly called to the case of Holland and wife against Stone, and it was not observed that the pleadings were different materially in that case from the others.

In the answer of Holland and wife which they make a cross-petition against E. M. Stone, and to which he made no reply,

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or, if he did, it has escaped the attention of the court, although a summons was served on him. They charge that the lot for which they are sued was conveyed by E. L. Lampton to Francis M. Minter, when he was an infant, that before he, Minter, was twenty-one years of age he sold the lot to D. B. Vannice, upon condition that he would execute a bond to Vannice with said E. M. Stone as his surety; that Minter would convey said lot of ground to him after he arrived at twenty-one years by deed vesting a good and valid title to said lot of ground in said Vannice; that a bond to that effect was executed and delivered by said Minter, with said Stone as his surety to said Vannice, and he became the purchaser of said lot for a valuable consideration. That after Minter arrived at twenty-one years of age he did convey said lot to Vannice. But the latter retained the bond executed by Minter and Stone to him, which was in his possession at Vannice's death, but since that event it has been lost or mislaid and they are unable to file it. And they repeat in their cross-petition against Stone that he covenanted in his said bond that said Minter should convey said lot to their vender, Vannice, and invest him with a clear and perfect title to the same.

They refer to and make the deed from Minter to Vannice, and from the heirs of the latter to them as parts of their cross-petition and allege that Stone, by his bond, is estopped to assert title to the lot against them.

The assertion of right to the lot by appellee, Stone, is directly opposed to and in conflict with his covenant or undertaking in the bond as set out in the cross-petition and, if executed by him, and it was not procured by the fraud or artifice of Vannice to whom it was executed, he is by his own writing precluded from asserting claim to this lot.

The execution of the bond by him is not denied, nor is fraud, or artifice charged. It therefore presents a barrier in his way which he can neither overcome, nor shun.

The judgment in favor of appellee, Stone, is, in its character, several against appellants, Holland and wife, etc., for "*Lot No. 41*," and they have prosecuted a separate appeal from that judgment--indeed, all the appeals in the case were prosecuted separately, to which no objection is, nor could be properly made, and

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if erroneous and prejudicial to them they have a right to have it reversed by this court, and as it is for the reasons herein stated clearly erroneous, said judgment is reversed and the cause is remanded with directions to the court below to dismiss the petition against appellants and for a judgment for costs. This reversal will not affect the other judgments against other parties.

Harrison, for appellants.

Caldwell, Pirtle & Caruth, for appellees.

W. H. SMITH v. W. J. WATKINS & STOKES.

Partnership—Evidence.

The fact that Stokes was the half owner of the house in which the business was conducted and was in the habit of aiding the firm to raise money for the purpose of purchasing the tobacco, tends to prove he was a partner in the business.

APPEAL FROM WARREN CIRCUIT COURT.

OPINION BY JUDGE PRYOR:

After a careful examination of the testimony presented in this record we are well satisfied that the appellant, Stokes, was a partner with Watkins & Smith in the tobacco venture for the year 1864. The relation as partners had existed between these parties during the years 1861, 1862 and 1863. No dissolution of this relation ever took place so far as the proof shows, and for the year 1864 the business progressed as it had done previously, and the appellee Watkins notified, upon some objections being made to Stokes by him, that Stokes would be kept in the firm as a partner. Stokes was the half owner of the building in which this business was conducted and during the year 1864 was in the habit of aiding the firm to raise money for the purpose of making their purchases of tobacco. It is true that the relation between Stokes and Watkins were not very amicable, but this instead of being an argument against his claim as a partner, tends, as we think, simply to show that he must have had some interest in the enterprise. The mutual dislike between the two parties would have induced Stokes to withdraw all

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pecuniary assistance by him to the firm and likely ended in his refusal to permit Watkins to use his interest in the building for the purpose of the partnership and the only way to reconcile the conduct of Stokes to the fact proven is, that he was induced to permit the property to be used of which he was a part owner and to raise money for the business for the reason that he was directly interested in the profits resulting from it. Smith was a competent witness as between Watkins and Stokes. Smith only claimed one-third of the profits of the concern. Watkins claimed one-half, or, in other words, that Smith and himself alone constituted the firm.

He was compelled to pay over, according to his own statements, two-thirds of the profits when, if the position assumed by Watkins is sustained, he would have to account for only one-half. He is testifying directly against his interest and upon the cross-petition of Stokes as well as in the original controversy he was a competent witness to establish other interest in the partnership than his own and Watkins, when that statement, if true, lessened the amount to which he might otherwise be entitled to. Smith's statement leaves no doubt upon the question of partnership and in this he is sustained by the declarations of Watkins made to others who testify in the case, and he is also strongly corroborated by the facts that in all the policies of insurance obtained upon this tobacco during the year 1864, and before this difficulty had its inception, the names of Smith, Stokes and Watkins were used as the owners of the tobacco. The proof shows conclusively that Stokes was a partner. The commissioner very properly excluded the claim of the appellant Smith for interest. The interest account, if the parties are to be charged with interest, would result against the appellant, and at any rate the extra services rendered by Watkins more than repaid the firm for any interest with which he is chargeable. There was no intention on the part of either of the partners to charge interest or pay for services. The commissioner's report, we think, settles this case upon an equitable basis and should have been confirmed. In adopting the commissioner's report as the judgment in this case the court below should require first the costs in that court to be paid out of the partnership fund, as one party is as much in default as the other. The judgment of

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the court below is reversed on the original and affirmed on the cross appeal, and for further proceedings consistent with this opinion.

Rodes, Rhea, for appellant.

Clarke, Dulaney, for appellee.

 CHAS. FORSTER v. MARTHA E. FORSTER.

Divorce—Alimony Pendente Lite.

The authority of the court to allow the wife alimony pendente lite should or should not be exercised according to the facts developed in each particular case. Held, that where the wife, without any reasonable cause, abandons the husband voluntarily and against his will, alimony should be refused.

APPEAL FROM NELSON CIRCUIT COURT.

May 1, 1872.

OPINION BY JUDGE HARDIN:

The authority of the court, in a suit for divorce and alimony, to allow the wife alimony *pendente lite*, under section 6, of article 3, of chapter 47, of the revised statutes, should or not be exercised according to the facts developed in each particular case, and, whereas, as is shown by the record in this case, the wife, without any reasonable cause, abandons the husband and, voluntarily and against his will, continues to live separately and apart from him, the application should be refused.

The order appealed from being deemed erroneous, therefore, the same is reversed and the cause remanded for further proceedings.

Muir & Wickliffe, for appellant.

 MINOR & DALLAM v. SMALLWOOD & QUERRY, ETC.

Injunction—Cannot Afford Relief Against Non-resident—Proceedings in rem—Personal Judgment.

As Moore was absent and actual process on him not obtainable, a personal judgment against him could not be rendered. The only

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mode by which appellants could obtain effectual relief was by proceedings *in rem*.

Injunction—Jurisdiction—Attachment—Actual Service of Process.

A mere injunction which might compel all within the jurisdiction of the court to refrain from action, could afford appellants no relief against those upon whom they could not get actual service of process. As their debtor was not within the jurisdiction of the court, it was needful that they seize on some property, choses in action, or something upon which the judgment of the court could operate.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

May 7, 1872.

OPINION BY JUDGE PETERS:

As Moore was absent and actual service of process on him not attainable, a personal judgment against him could not be rendered, and the only mode by which appellants could obtain effectual relief was by a proceeding *in rem*.

The mere injunction which might compel all within the jurisdiction of the court to refrain from action, could afford appellants no relief against those upon whom they could not get actual service, nor was it the remedy they needed, it could not advance their rights, either as a temporary remedy or as the final judgment of the court. Their case needed more active remedies, as their debtor was not within the jurisdiction of the court, it was needful for them to seize on some property, choses in action, or some *thing* on which the judgment of the court could operate, but the means to attain that end appellants failed to adopt, and even in their amended petition they refrain from asking for, or suing out an attachment; these were fatal omissions which cannot be remedied after others equally meritorious have profited by them.

Whether or not the funds in the hands of the master were subject to be attached is a question which need not be discussed on this appeal, for let it be decided either way, still the judgment would not prejudice appellants, and they are not therefore interested in the question.

Judgment affirmed.

James, for appellant.

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JOHN RIDGWAY AND OTHERS v. MALINDA HALL.

**Will—Testator Laboring Under Great Hatred, Prejudice and Delusion—
Discovery of Mistake—Failure to Revoke.**

The testator acted unnaturally in disinheriting the orphan children of his deceased son, who were wholly guiltless of any offense toward him, either real or fancied. When he executed the will he was laboring under a very great prejudice toward their mother, growing out of her separation from her husband, and the suspicion upon the part of himself and family that she was instrumental in bringing about his death. Afterwards he became convinced that his suspicion against his daughter-in-law was without foundation and that he had made a will that would have the effect of disinheriting her children without sufficient cause, but he died without revoking it. Held, that at the time the testator executed the will he was laboring under such a degree of hatred and prejudice toward his daughter-in-law and under such a fixed delusion as to her agency in bringing about the death of his son, as to render him insane as to her and her children, and consequently at that time his mind was not in a proper state for disposing of his estate with reason, and that after he realized the delusion under which he acted when the will was written, he had become so completely under the domination of the appellee that he did not have the moral courage to destroy it.

APPEAL FROM HENRY CIRCUIT COURT.

September 12, 1871.

OPINION BY JUDGE LINDSAY:

This appeal presents two questions.

Was the testator, Samuel Ridgway, of a sound and disposing mind when he executed the paper offered by the propounders as his last will and testament?

If he was not, did his failure to revoke or destroy the same amount to a ratification of its provisions and a re-execution of the supposed will?

From the evidence we are constrained to conclude that the testator acted unnaturally in disinheriting the orphan children of his deceased son Richard, who were not only infants at the time, but wholly guiltless of any offense towards him, either real or fancied. Further, that when he executed the paper, he was laboring under a very great prejudice towards their mother, growing out of her separation from and suit against her deceased husband for divorce and alimony, and the suspicion upon the

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part of himself and family that she had been actively instrumental in procuring or bringing about his death.

It seems she instituted a divorce suit on the 13th of November, 1851, and that on the same day her husband gave to the testator a mortgage upon all his estate to secure the payment of an alleged debt of near \$800.00. This debt and mortgage Mrs. Ridgway charged to be fraudulent, and intended to prevent her from securing alimony, and this charge had the effect of still further exasperating the testator. In point of fact it seems that Richard Ridgway committed suicide, but for some reason not developed by the record his father was of the opinion that he had been murdered, and that his daughter-in-law was the instigator, if not a participant in the murder. Whilst these convictions had full control of the testator's mind, he (in July, 1852) executed the paper now before us.

His conduct at the time, and the paper upon its face clearly indicate the most intense aversion towards and hatred of the wife of his deceased son, and the will is conclusive of the fact that he was so completely mastered by his feelings, as to permit them to influence and control him in his conduct towards the unoffending children of the woman he hated.

His subsequent statements authorizes the inference that this unnatural and unfounded bitterness and prejudice was intensified by the influence of his wife and daughter who were the sole beneficiaries under the will. To his wife he gave all his estate during life with remainder to his daughter, the appellee, and stated that he gave nothing to the children of his deceased son, for reasons that he did not desire to disclose.

In 1859 his wife died, and shortly after her death it seems he became convinced that his suspicions against his daughter-in-law were without foundation, and that he had made a will which would have the effect of disinheriting her children without sufficient cause.

He frequently spoke of its having been written when he was aggrieved by his daughter-in-law, expressed dissatisfaction with its provisions and often characterized it as "Linda's" (Mrs. Hall's) will.

His failure to destroy it may be accounted for by the fact that it was not in his possession, and that for some time before his

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death, the draftsman, in whose hands it was left, was absent from Kentucky. Further, his habits of dissipation disqualified him in the latter years of his life from taking any decided action in matters of this kind.

In addition to all this it cannot be doubted but that after the death of his wife he was, to a very great degree, under the control and domination of the appellee, Mrs. Hall.

The evidence before us is not entirely consistent, and some of it relied upon by appellants is scarcely entitled to credit, but all the facts in the case being considered, we are of opinion that Samuel Ridgway, at the time he executed the paper before us, was laboring under such a degree of hatred and prejudice towards his daughter-in-law, and under such a fixed delusion as to her agency in bringing about the death of his son, as to render him insane as to her and her children and, consequently, that at that time his mind was not in a proper state for disposing of his estate with reason, or according to a fixed judgment uninfluenced by designing relations or interested friends.

We are also of opinion that after he discovered his mistake, and he realized the delusion under which he acted when the will was written, he had become so completely subversive of the influence and domination of the appellee that he did not have the moral courage to destroy or revoke the will, nor to do anything in the premises, prejudicial to her interest, or contrary to her wishes.

For these reasons the judgment of the court below is reversed and the cause remanded with instructions to that court to issue its mandate to the county court of Henry county directing and requiring that court to set aside and hold for naught its order admitting to probate the paper offered by the propounders as the last will and testament of Samuel Ridgway, deceased, and for such orders or proceedings as may be proper in the premises.

Chief Justice Pryor not sitting.

Rodman, Marshall, Montfort, for appellants.

Lindsay, Scott, DeHaven, for appellee.

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W. H. H. ROBBINS *v.* LABELLA ROBBINS ET AL.

Trusts—Resulting Trust—Property Paid for by Money Partly Furnished by Another—Mistake in Deed.

A trust will not result to sons who furnish their father money, in the absence of proof that it went to pay for the land purchased by the father, especially when the draftsman proves that there was no mistake in the execution of the deed in inserting the father's name as grantee instead of the sons.

Partition—Sale and Division of Proceeds—Adverse Claimants.

A party who has joined in a suit for partition cannot afterward be heard to say that the property belonged to another party.

APPEAL FROM FAYETTE CIRCUIT COURT.

September 26, 1871.

OPINION BY JUDGE PRYOR:

After a careful examination of the record in this case we have been unable to find any proof upon which a resulting trust was created in favor of appellant by the purchase of the house and lot in controversy. The draftsman of the deed to W. U. Robbins, who was also the vendor of the property, says there was no such mistake in the execution of that instrument in inserting the father's name as grantee instead of the son's.

The principal witnesses for appellant are his sister and her husband. The old man had been twice married, and the appellant and his sister were children by his first wife—the parties all lived in the city of Lexington or near there when the *present* petition was filed for a sale of the property and a division of the proceeds between all the children. The sister and her husband both united in this petition with a full knowledge, as they now say that the appellant was the owner and entitled to the deed. The sister was as much instrumental in having the proceedings instituted as the stepmother—advised with lawyers in conjunction with her mother, and asserted the right of all the children to an interest in the house and lot—unfriendly relations soon after this originated between these witnesses and the appellee (the widow) and from this time the brother's claim to the property seems to have been contested, resulting in the filing of his cross-petition in this case, claiming the property as his. There

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is no doubt but what the appellant and his brother, while in the army, sent to their father monies at different times, but whether it was applied to the purchase of this house and lot is uncertain, and, if so, the means of both contributees to the payment of the purchase money, and if a trust resulted for the one it should for the other. The proof also shows that the old man made some money, and fair inference is that some portion of the proceeds of his own labor contributed to the purchase. The money sent to the father was no doubt to aid him in the support of his family of small children, and intended as a donation and not to be invested for appellant's benefit as alleged.

The proof shows that the old man was an honest, clever and industrious man, and if this alleged confidence had been placed in him, he never would have betrayed it. We see no error in the judgment dismissing the appellant's cross-petition. The claim set up against the administrator has no connection whatever with the controversy between the parties; he was not a defendant to the original petition and in this proceeding by the heirs to sell a house and lot one of the children is seeking to recover of the administrator an account created against him since the intestate's death. Although unanswered by the administrator, the court acted properly in requiring him to resort to the proper remedy of enforcing his claim.

The judgment of the court below is *affirmed*.

Huston & Mulligan, for appellant.

Billingsly, for appellees.

H. S. BUCKNER & Co. v. WINGFORD, NEWKIRK & Co., ETC.

Homestead—Bona Fide Housekeeper—Fraudulent Conveyance to Wife—Intention to Occupy Before Completion—Occupancy—Intention to Defraud Creditors.

The house and lot sought to be subjected to Wingard's debts was owned by him before any of the debts owing to appellees were contracted; that it was of less value than one thousand dollars; that he was a bona fide housekeeper, with a family, living upon rented property and owning no other real estate except this house; that he did not use the house as a residence, but that is accounted for by the fact that it had not been completed. He sold it to Newkirk, and Newkirk sold it to Wingard's wife. No consideration passed. He

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manifested an intention to occupy the house when completed. Held, that according to the spirit and intention of the Homestead Act, the house and lot were exempt from sale under execution, attachment or judgment of any court; that, although the conveyance was made without consideration, and possibly with the intention on the part of Wingard to defraud his creditors, still the property was not subject to the payment of his debts before the conveyance, and the fact that the title is now in the wife does not change its status.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 12, 1871.

OPINION BY JUDGE LINDSAY:

All the testimony presented by these records conduces to establish that the pretended sale of the stock of merchandis by Wingard & Combs to Newkirk was merely colorable; that it was an attempted fraud upon these creditors in which Newkirk was a willing participant. The judgment of the chancellor, so far as it subjects this merchandise to the payment of appellees' claims must, therefore, be affirmed. It appears that the house and lot in Jeffersontown was owned by Wingord before any of the debts owing to these appellees were contracted; that it was of less value than one thousand dollars; that Wingord was a bona fide housekeeper with a family, living upon rented premises and owning no other realty except this house and lot. It does not appear that he used the house as a residence, but that is accounted for by the fact that it had not been completed and therefore could not be occupied. The testimony shows that he was at the time he is alleged to have fraudulently vested the title in his wife by the two conveyances, the one from himself to Newkirk and the other from Newkirk to his wife, busily engaged in completing the dwelling so that it might be used as a residence.

Considering all the circumstances, we think it may be naturally assumed that he was at the time treating the property as his future place of residence, and that he had manifested his intention to actually use the house when completed as a home for himself and family.

According to the spirit and intention of the homestead act the house and lot "was exempt from sale under execution, attach-

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ment or judgment of any court except to foreclose a mortgage given by the owner of the homestead, or for purchase money due therefor." *Brown Bros. etc., v. Martin, etc.*, 4 Bush 47.

We do not concur with the chancellor that Wingord's conveyance to Newkirk affects the claim of Mrs. Wingord, who now holds the title to the house and lot.

This conveyance was without consideration and possibly made by Wingord with the intent to defraud his creditors. But the property conveyed was not subject to the payment of the appellees' debts, before the conveyance, and we are not aware of any principle of law which will authorize them to subject it now that the title is held by the wife. The homestead act, expressly provides that if the husband had retained the title, he would not have waived the exemption except by a writing subscribed by himself and wife, and acknowledged and recorded in the same manner as conveyances of real estate. Section 5, Myers' Supplement, 715.

The wife did not join in the conveyance to Newkirk, nor in any manner participate in the fraudulent intent of her husband and Newkirk. She is the mere recipient of a gift of property from her husband, which property he could not, before the gift was made, permit to be subjected to the payment of his debts without her written consent, given upon privy examination.

We are of opinion that the chancellor erred in subjecting the house and lot described in said two deeds to the payment of appellees' debts, and to that extent the judgment in these causes is reversed. The same are remanded for further proper proceedings consistent with this opinion.

Fox, for appellants.

JAMES K. PATTERSON v. DARIUS FIELD, ETC.

Principal and Surety—Mortgage Taken by Payee on Property of Payor Does Not Increase Risk of Surety—Proceeds of Mortgage Must be Applied to Note.

The fact that Wing, the agent for the appellant, Patterson, took from Darius Field a mortgage on the crop of tobacco then in his possession to secure the payment of the note sued on, could not

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have increased the risk of Mrs. Field, the surety, nor have prevented her from taking steps at any time to indemnify herself against apprehended loss. But the proceeds of the mortgage should have been applied to the judgment.

Bills and Notes—Credit by Mistake.

The mere fact that Wing entered a credit of \$500 on the note under the erroneous belief that the tobacco, when sold, would net that amount, does not commit the appellant to the credit.

Fraudulent Conveyance—Conveyance by Husband—Wife to Enjoy Profits.

The conveyance to C. H. Hyness, upon its face, develops the fact that it was intended merely to invest him with the title to the land conveyed, whilst Mrs. Field and her family were to continue to enjoy its profits. Such conveyance cannot be upheld against creditors.

APPEAL FROM DAVIESS CIRCUIT COURT.

September 19, 1871.

OPINION BY JUDGE LINDSAY:

The fact that Wing, the agent for the appellant, Patterson, took from Darius Field a mortgage on the crop of tobacco then in his possession to secure the payment of the note sued on, could not have increased the risk of Mrs. Field, the surety, nor have prevented her from taking steps at any time to indemnify herself against apprehended loss. Hence, the acceptance of the mortgage did not release her from liability as surety on the note.

Wing, as agent for Patterson, held the tobacco so mortgaged for the benefit as well of Mrs. Field as of his principal. He was bound to apply the proceeds of the same to the judgment on the note, and in so far as he failed to do so, Mrs. Field is entitled to be relieved.

The agreement that the tobacco should be sold to a New York firm was made without the consent of appellee and, of course, she is not committed to the result of the venture. She has the right to insist that the note shall be credited by the net value of the tobacco in Daviess county at the time it ought to have been ready for market, and if less than that amount was realized by the shipment to New York the loss must be borne by appellant and not by her.

It is, however, shown by oral testimony, that at the time of the execution of the mortgage there was an execution lien upon

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the tobacco. This lien, of course, was superior to that of the mortgage, and if he has been compelled to discharge it, to that extent he is not chargeable with the value of the tobacco.

The mere fact that Wing entered a credit on the note for the five hundred dollars advanced to him under the erroneous belief that the tobacco would, when sold, net that amount, does not, in our opinion, commit the appellant to that credit.

The note should first be purged of usury. Then the value of the crop of tobacco in Daviess county at the time it should have been put upon the market should be ascertained, and this amount less the execution lien (if one existed) should be credited on the note and judgment rendered against Mrs. Field for such balance as may remain unpaid.

The conveyance to S. H. Hyness upon its face develops the fact that it was intended merely to re-invest him with the title to the land conveyed, whilst Mrs. Field and her family were to continue to enjoy its profits. Such conveyances cannot be upheld as against creditors.

Upon the return of the cause such portion of the land (not exempt from sale under execution) as may be necessary, should be subjected to the payment of any judgment appellant may recover against Mrs. Field.

Judgment reversed and the cause remanded for further proceedings consistent with this opinion.

Kinthead, Buckner, Weir, for appellant.

Sweeney & Sweeney, for appellee.

HATTIE F. REEVES v. S. L. MOORE, ETC.

Guardian and Ward—Purchase of Land by Guardian—Purchase Money Paid Out of Funds Belonging to Ward—Resulting Trust—Notice of Trust by Mortgagee—Consent of Infant—Statute of Frauds.

The appellant, Mattie F. Reeves, while an infant, inherited from her grandfather about \$4,500 in money. She had no statutory guardian, and her father took charge of her property and bought a tract of land and paid the purchase price out of funds belonging to her. He afterwards mortgaged this land to Williams and Barnet, who had notice that it had been paid for out of the infant's money. They

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made an assignment and their assignee brought this suit to foreclose the mortgage, and the appellants were made parties thereto. Held, that the father held the money as the natural guardian of his daughter, and that when a guardian purchases land with the money of his ward, the ward may either take the land or consider it as security for the money; that a father's possession of his infant child's property as natural guardian does not subject it to his creditors, nor make a sale effectual against the child; that an infant cannot consent to the disposition of its property; that a trust resulted in favor of the infant and she is entitled to her money invested in this land.

APPEAL FROM McLEAN CIRCUIT COURT.

November 9, 1871.

OPINION BY JUDGE PRYOR:

H. W. Tomlin, being indebted to the firm of Williams & Barnet in two notes, one for \$1,000.00 and the other for five hundred dollars, in order to secure their payment executed to the latter two separate mortgages upon the same tract of land, as described in the mortgages and exhibits filed, as the land purchased by Tomlin of F. M. Sluader and wife, and containing 146¼ acres. One of the mortgages was dated on the 10th of February, 1866, and the other on the 10th of October, 1866.

Williams & Barnet, after the execution of these mortgages, were declared bankrupts, and the appellee, Moore, was their assignee, and they also, by an assignment in writing, transferred to him the debts of Tomlin for the benefit of their creditors. Moore, as assignee of Williams & Barnet, filed the present suit in equity to foreclose these mortgages, and while the suit was pending, the appellants, Mattie F. Reeves, and her husband, filed their petition to be made parties, and their petition is made their answer and also a cross-petition against Williams & Barnet and Moore, their assignee. This cross-petition alleges, that in the year 1863, Mattie Reeves (one of the appellants), who is a daughter of Tomlin, inherited from her grandfather, who died in the state of Maryland, about \$4,500.00 in money and a number of slaves; that when she was about 18 years of age and without any statutory guardian, she accompanied her father to the state of Maryland and there had a settlement with those in charge of her grandfather's estate, and received in checks, payable to herself, about \$4,500.00 in money, and the negroes; that she en-

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dorsed the checks to her father and he collected the money, or obtained other checks, and, upon his return to Kentucky, deposited the money in checks with the firm of Williams & Barnet, the sum of \$3,000.00; that when her father purchased this land of Sluader, in the year of 1853, in payment therefor he drew upon Williams & Barnet for two thousand dollars of the money deposited with them, and the same was paid by them to Sluader; that Williams & Barnet knew when they took the mortgages from the father on this land that it was her money that paid for it and that it was her money that had been deposited with them. One thousand dollars of the three thousand deposited with Williams & Barnet was applied by them to the payment of accounts for merchandise due them by Miss Reeves and her father. The proof shows that Miss Reeves was under 21 years of age when the money was paid her father, and about 18 years of age when the land was purchased of Sluader in the year 1863; that she had no statutory guardian; that twenty-five hundred dollars of her money has been used by her father in addition to the money invested in the Sluader land; that her negro slaves is all accounted for, and all this waste of her estate occurring during her minority. When Mrs. Reeves married does not appear, but this answer and cross-petition was filed in about one year after her arrival of age.

She alleges in her cross petition that Williams & Barnet had full knowledge of the fact when they took these mortgages that the land had been bought and paid for with her money which had been deposited with them and which they well knew belonged to her. Barnet & Williams answer and do not deny this allegation. It is denied by the assignee who was, of course, a stranger to these transactions, but the history of the case as presented by the pleadings and testimony of the father, is sufficient to satisfy this court, that Williams & Barnet knew all about it. Tomlin, so far as the record shows, had but little, if any, property. His trip to Maryland with his daughter, after her estate, and his return and depositing the money with Williams & Barnet, the business men of the place where they all lived, all conduces to show that they must have known whose money it was and how it was obtained. The father held the money as the natural guardian of his daughter, and in the case of

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Edmonds vs. Morrison, 5 Dana 224, this court decided that when a guardian purchased land with the money of the ward, the ward may either take the land or consider it as security for the money. And, again, in the case of *Forsyth vs. Kreakbaum*, 7 T. B. Monroe 97, this court says: "That a father's possession of his infant child's property as natural guardian does not subject it to his creditors, nor make the sale of it effectual as against the child. In this case, the infant daughter of Tomlin had no power to contrroll her father in the disposition he was making of her estate and for this reason it cannot be argued that she gave her consent to the appropriation of the monies for his individual purposes. Nor is this case affected by section 20, chapter 80, of the Revised Statutes, which reads: "That where a deed is made to one person, and the consideration therefor should be paid by another, no use or trust shall result in favor of the latter." The 22d section of the same chapter provides expressly that the provisions of section 20 shall not extend to cases where the grantee shall have taken a deed in his own name, without the consent of the person paying the consideration, or where the grantee is violation of some trust, shall have purchased the lands deeded with the effects of another person. This act, instead of sustaining the view of this case as presented by appellees' counsel, is here quoted as authority in favor of sustaining the equitable rights of the appellants as against the creditors of and purchasers from her father. We are satisfied that the appellant is entitled to her money invested in this land by the father with interest from June 1, 1863, the date of the purchase, and conveyance of the land by Sluader and wife to Tomlin. It is unnecessary to commit this case to a commissioner, as the father has already spent \$2,500.00 of her money as well as the hire of her negroes.

One thousand dollars of this sum Barnet & Williams obtained from him, and no greater expenditure would be sanctioned by this court of the ward's money. The judgment of the court below, dismissing appellants' cross-petition, is reversed and the cause remanded with directions to render a judgment in favor of appellants thereon for \$2,000.00, with interest from June 1, 1863, until paid, and the land bought of Sluader and wife to be held in lien for the payment of the same and costs. The court

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below will sell the land, first to pay the debts of appellant and then the debt of appellee.

S. J. Boyd, for appellant.

Brickens, for appellees.

E. B. REEDER, ETC., v. MARIA BELL.

Trespass to Try Title—Tenant Estopped to Claim Adversely to Landlord.

The proof in this case shows that the appellee entered upon the land in controversy, with her husband, under a lease from appellant; she is therefore estopped to claim possession adversely to them.

APPEAL FROM KENTON CIRCUIT COURT.

September 27, 1871.

OPINION BY JUDGE PRYOR:

The appellants in this case show a connected chain of title from the commonwealth down, embracing the land in controversy. This title is perfect and complete. The location of the boundary line known as A. B., on the plat exhibited to the jury in this case between the Fields' patent, under which the appellants claim, and the third survey in the division of lands belonging and covered by Harris's patent, seems to have been the principal question in this case. The testimony of four different surveyors aided by that of several persons living in the vicinity of the land in controversy, show that the line A. B. on the plat is the true boundary between the two patents. These witnesses also state that the land in controversy is within the Fields' patent boundary, and covered by the deeds to appellants. Appellants show their possession for many years by themselves and tenant, and at the time, Bell, the husband of the appellee, Maria Bell, entered upon this land and commenced cutting timber, he was notified by appellants' tenant, then in possession, to cease the cutting, and was informed by Bell that he leased the land from appellants, and this statement the tenant found to be true upon inquiry made of them. Appellants also proved by seven or eight witnesses that during the time Bell was in possession

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he claimed to hold under them, and in fact the proof is conclusive upon this branch of the case. The widow also shows to have held in the same way after her death. The appellees, upon the trial, claimed to hold under Bryan and Slatter, and attempt to prove by Yates that Bell entered upon the land under a lease from Williamson, the agent of Bryan and Slatter. They also exhibit a patent to one Jacob Rubsamor, junior in date to the Fields' patent, but failed to connect themselves by title or possession with either patent. In addition to all this it appears that the agent of Bryan and Slatter placed a man of the name of Petty within the alleged interference of these two patents and that appellants brought suit for the possession against Petty and recovered. We perceive no testimony upon which the jury were authorized to find a verdict for the defendant. The cause is reversed with directions to the court below to set aside the verdict and judgment in the case and grant to appellant a new trial and for further proceedings not inconsistent with this opinion.

Stevenson & Myers, for appellant.

Carlisle & O'Harra, for appellee.

JESSE L. WALLACE v. JOHN WALLACE.**Wills—Conditions Annexed to Devise—Failure to Perform—Forfeiture.**

Where a condition is annexed to a devise, a failure by the devisee to comply with it will work a forfeit to his right to claim the property so bequeathed.

APPEAL FROM PENDLETON CIRCUIT COURT.

March 29, 1872.

OPINION BY JUDGE LINDSAY:

John Wallace bases his right to the fifty acres of land adjudged him by the court below upon his alleged compliance with the conditions annexed by his father to the devise under which he claims title.

The proof conduces to show that he did take care of the two women for about two years, possibly as long as three years, but

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it is shown beyond doubt that after that time he made no provision for them whatever.

The testimony of the administrator, Edward Wallace, is entitled to but little weight. In the petition filed by him in August, 1848, but a little over one year after his father's death, he charged that John had utterly failed and refused to provide for and take care of the two women. In his deposition given in this case he states that at the time this bill was filed the women were both living with him. The pretense that John had made arrangements with him to take care of them is a mere after thought, a device trumped up for the purposes of this suit, which fact Edward demonstrates upon his cross-examination. John has never paid him a cent on such account, and it was never contemplated, prior to the institution of this suit that he should. The presumption that Edward was acquainted with the contents of a bill in equity filed by himself, is not to be rebutted by his statements to the contrary made twenty years afterwards. The fact that John failed for twenty years to assert claim to the land, although he was in needy circumstances during all that time, is a confession by him that he had failed and refused to perform the condition annexed to the devise and had voluntarily abandoned all claim to the land.

Feeling assured that the claim asserted in this suit is not only stale, but unfounded, we are of opinion that the chancellor erred in granting the relief prayed for.

The judgment is reversed and the cause remanded with instructions to dismiss appellee's petition.

Simon, McManana, for appellant.

C. H. Lee, for appellee.

W. F. TALBOTT, ETC., v. PHILLIPS & SCALLY, ETC.**Lis Pendens—How Created—Commencement of Suit.**

A *lis pendens* is created, as to specific property sought to be subjected to the payment of particular debts, by the commencement of an action for that purpose. A suit can be commenced in no other way than by filing a petition in the office of the clerk of the proper court and causing a summons to be issued thereon.

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Fraudulent Conveyance—Proper Parties—Jurisdiction.

In an action to subject property fraudulently conveyed to the debts of the vendor, he, as well as the vendee, must be made parties by appropriate pleading and summons must issue against all of them before a court of equity will take jurisdiction.

Bankruptcy—Discharge a Bar—Pleading.

A discharge in bankruptcy will exonerate a bankrupt from the payment of all debts provable under the bankruptcy act, existing at the time he filed his petition, if properly pleaded.

APPEAL FROM WASHINGTON CIRCUIT COURT.

December 16, 1871.

OPINION BY JUDGE LINDSAY:

Appellants claim that there was a *lis pendens* as to the property sought to be subjected to the payment of their claims against Hood at the time he filed his petition in the bankrupt court.

A *lis pendens* is created as to specific property sought to be subjected to the payment of particular debts by the commencement of an action for that purpose. *Scott vs. McMullen*, 1 Littell 308; *Watson vs. Watson*, 2 Duvall 410.

Appellants filed their petition in the clerk's office on the 30th of July, 1868, and on that day caused summons to be sued out against the appellees, Scally & Phillips, who are alleged to be the fraudulent vendees of the debtor, Hood.

No summons was sued out against the latter until March 27, 1869. He filed his petition in the proper court and became a voluntary bankrupt on the 29th of December, 1868.

His discharge exonerates him from the payment of all debts proveable under the bankrupt act existing at the time. He filed such petition under the provisions of section 65, Civil Code of Practice. A suit can be commenced in no other way than "by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon." Until the summons was sued out against the debtor, Hood, the action can not be said to have been commenced against him. Appellants insist, however, that it was commenced against the parties holding the legal title to the property, and that this was enough to create an equitable lien thereon in their favor.

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The right of appellant to subject the property in the hands of the appellees, conceding them to be fraudulent vendees of Hood, must depend upon their ability to establish the existence of the claims they set up against the latter. He was, therefore, a necessary party to this suit. 2 Duvall 408. They could not make him a party by merely inserting his name in the style of their action and setting out the necessary facts in their petition to show that they were entitled to recover against him. They could only commence the action against him by causing a summons to be issued upon their petition. Up to the 27th of March, 1869, they had failed to do this, and he was therefore not a party to the proceeding prior to that date. Until he was made a party the petition against Scally & Phillips showed no case for the jurisdiction of the chancellor. Until the petition exhibited a state of case authorizing the court to afford the relief sought, and the action has been commenced against all of the indispensable parties, the proceeding could not operate as a *lis pendens*. *Jones vs. Lusk*, 2 Metcalfe 359; *Pearson vs. Keedy*, 6 B. Monroe 130.

If this view of the law be correct and we are satisfied that it is sustained both by reason and authority, there was no *lis pendens* as to the property in contest existing on the 29th of December, 1868, when Hood became a bankrupt.

His subsequent discharge, which was properly pleaded, presented a bar to the right of appellants to recover against him, and as they had no subsisting lien on the realty held by appellees at the time Hood became a bankrupt, they were not entitled to subject the property to the judgment on these claims by a proceeding in a state court. The judgment dismissing the petition of appellants is therefore *affirmed*.

Harrison, for appellants.

A. J. RENT, ETC., v. CATHERINE COX.**Wills—Conveyance After Making Will—Deed Procured by Undue Influence.**

In the year 1867 Ann Rent made her last will and testament by which she devised all of her estate to her two children, A. C. Rent and Mrs. Catherine Cox, for life, with remainder to their children.

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On the 16th day of April, 1869, the devisor executed a deed to her son, A. C. Rent, one of the appellants, by which she conveyed all of the property devised to Mrs. Cox to him, in trust for his children. For months previous, and about the date of this deed, her many neighbors, who had known her for many years, testified that her mental faculties were much impaired, and to such an extent, in the opinion of many, as to render her incapable of executing such an instrument. She was then residing with her son, A. C. Rent. Deed cancelled.

APPEAL FROM KENTON CIRCUIT COURT.

September 11, 1871.

OPINION BY JUDGE PRYOR:

In the year 1867 Mrs. Ann Rent made and published her last will and testament by which she devised all her estate, consisting mostly of town lots in the city of Covington, to her two children, A. C. Rent, one of the appellants, and Mrs. Catherine Cox, one of the appellees. The devise to her children was for their natural lives and to their children in remainder. In the year 1869 the devisor departed this life in the city of Covington, where she resided at the time this will was executed, and in the month of October of that year, this paper was admitted to record in the Kenton county court. On the 16th of April, 1869, the devisor (Ann Rent) executed a deed to her son, A. C. Rent, one of the appellants, by which she conveyed all of the property devised to her daughter Mrs. Cox in trust for his (A. C. Rent's) children. This deed was acknowledged before the clerk of the Kenton county court on the day after its execution. After the execution of the deed the appellant, A. C. Rent, on the same day executed a deed to his sister, Mrs. Cox, for a tract of five hundred acres of land in the state of Tennessee—the consideration of this deed as appears upon its face is for love and affection. The devisor Mrs. Rent died in October, 1869, and soon after her death the appellee Catharine Cox and her children filed this petition in equity in the Kenton circuit court, alleging that at the date of the conveyance from her mother to A. C. Rent of the property devised to her by the will—the old lady was of unsound mind and incompetent to execute such a paper and asks that it be annulled. An amended petition was filed in which it is also

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alleged that the deed of the 16th of April, 1869, was procured to be executed by undue and improper influence exercised over the mother by the appellant A. C. Rent. The allegations of the petition and amended petition are all denied so far as the petition alleges any want of mind on the part of Mrs. Rent when she made the deeds and also denying any improper influences exercised over the old lady by A. C. Rent or any one else. There is no question as to the capacity of Mrs. Rent at the time she made and published her will to execute such a paper. On the day the conveyance was made by the old lady to her son A. G. Rent by which she disinherited her daughter and left her without a dollar, she was about seventy years of age, her health had been bad for some time with but little hope of any improvement in her condition. For months previous and at or about the date of this deed, her many neighbors and acquaintances who had known her for years and whose depositions have been taken in this case, disclosed that her mental faculties were much impaired, and to such an extent in the opinion of many as to render her incapable of executing such an instrument. These opinions are based on conversations had with the old lady, the details of which are given in the record. She was then living at the home of her son A. G. Rent. He had procured an attorney or friend to write the deed. It was written not in the presence of the old lady, although read to her after it was written.

The proof shows that she expressed herself satisfied with the deed, and that she remarked that in her opinion the Tennessee property would suit her daughter best. This property is the five hundred acres of land that appellant A. G. Rent says in his answer and deposition he conveyed to his sister Mrs. Cox in consideration of love and affection, and because of his regret that the old lady, his mother, by the deed to him, deprived his sister of the property devised to her. This deed to his sister the appellant had in his possession the day the old lady made the deed to him, and has there kept it ever since. He says that his mother had no knowledge of his intention to make his sister the deed; that he never so informed her and that this deed to the sister was no inducement to the mother to make the deed to him as consideration for it. It is difficult to reconcile this statement with the declaration made by Mrs. Rent at the time

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she made this deed: that the Tennessee land would suit her daughter best.

This Tennessee land it is difficult to find, and if the appellant has the undisputed right to it and with a perfect title, still it costs him nothing and from the proof the court is inclined to think is of but little, if any, value. We are also of the opinion that the appellant must have induced the old lady to forget her obligations to provide for the daughter by suggestions to her that this Tennessee land was of more value than the land devised to Mrs. Cox. These suggestions must have emanated from the appellant, A. G. Rent. The efforts on the part of the appellant to show unfriendly relations between the mother and daughter as a reason for the execution of this deed has utterly failed.

The judgment of the court below cancelling the deed is affirmed.

Ellis, for appellant.

Handy, for appellee.

E. J. POLK v. R. MCCREADY, AND OTHERS.**Executions—Levy on Encumbered Property—Statutes.**

The statute provides that where a defendant in an execution shall have owned the legal title to any real or personal estate, has created an incumbrance thereon, his interest may be levied on. In this case the legal title was in Thomas M. Burford, and he conveyed it to the appellant, and in that conveyance created a lien on it for the support of himself and wife. Appellant created no incumbrance, nor was he the owner of the legal title until the deed creating the incumbrance was made to him by his father. It therefore follows that this case cannot be affected by the provisions of the statute referred to.

Executions—Sale Under—Pendency of Litigation Over Title—Inadequacy of Price.

Where a sale of land is made under an execution, pending a suit to vacate the deed to the property under which the defendant in the execution holds title, and the case is thereafter decided in his favor, the sale will be set aside if the property sold at a sacrifice, for the reason that the pendency of the suit affected the value of the property and had a tendency to prevent others from bidding for it.

APPEAL FROM MERCER CIRCUIT COURT.**October 6, 1871.****OPINION BY JUDGE PRYOR:**

The provisions of the Revised Statutes regulating sales of encumbered property under execution do not apply to a case like this—the statute provides, “That where a defendant in an execution shall have owned the legal title in any real or personal estate, and has created an incumbrance there on his interest may be levied on, etc.” In this case the legal title was in Thomas M. Burford, and he conveyed it to the appellee, Thos D. Burford and in that conveyance created in lien upon the land for the support of himself and wife. Thos. D. Burford created no incumbrance nor was he the owner of the legal title until the deed creating the incumbrance was made him by his father—it therefore follows that this case cannot be effected by the provision of the statute referred to—*Bondurant vs. Owens*, 4 Bush, page 662. The appellee, Thos. O. Burford, filed his answer and cross-petition in this case in which he alleges that the 100 acres of land, or his interest therein held under various executions named in the pleadings was at the time worth five thousand dollars, and that this land sold at a great sacrifice bringing at the sale only \$800. That the appellant at the time he purchased the land was the attorney for some of the plaintiffs in the executions, etc., and asks that the sale be set aside.

The appellant in his answer to this cross petition admits that he was the attorney for two plaintiffs in the executions, but in addition states, that he was also the statutory guardian of one of them, and was in duty bound to make the property pay the debt; he denies that the property was sold at a sacrifice and gives as a reason for this statement that at the time of the sale there was a suit pending by some of Thos. M. Burford’s children to vacate the deed under which Thos. D. Burford claimed the land—that this uncertainty as to the title connected with the widow’s right to dower lessened the land in value, etc. The proof shows that this suit was pending at the time and was afterwards decided for Thos. D. Burford sustaining the deed. The land unincumbered was worth \$12,000, and with all the incum-

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branches upon it was valued at \$5,000. The appellant no doubt was looking to the interest of his ward in buying the land and made the purchase in good faith, but it is equally clear, that the pendency of the suit to vacate the deed affected greatly the value of the property and prevented others from bidding for it. The appllant in estimating the value of the land was influenced as to the amount of the bid on account of the uncertainty of the title resulting from this litigation, although acting in the double capacity of attorney and guardian and deriving no pecuniary benefit from the sale himself, still the sacrifice of this property is too great for this court by its judgment to confirm the sale. 7th Dana. Howell's heirs vs. McCraig's heirs, page 388.

The questions made by the appellant in his brief as to the rights of the widow cannot be considered as she is not a party to this appeal. The purchaser of the land under the sale will take it subject to the uses mentioned in the deed, and her right to retain the possession if she desires for her support and maintenance.

Judgment of the lower court is affirmed.

Polk, for appellant.

J. B. & P. B. Thompson, for appellee.

G. N. REED *v.* JOHN P. REED.

Will—Power of Sale in Executor—Discretion as to Sale With Devisee—Life Estate—Remainder.

"I will and bequeath to Harriet Evans twenty acres of land, to hers and her children's," etc. "If she, Harriet, should prefer selling the land I authorize my executor to sell it for her and invest the money in any safe manner for the benefit of her and her children." Held, that the discretion to be exercised as to whether or not a sale is to be made of the property is left with Harriet Evans alone, but the power to sell and reinvest the proceeds is with the executor. The intention of the devisor was to give Harriet a life estate in the land, with remainder to her children.

Pleading—Action to Set Aside Re-Investment Under Will—Allegation of Answer Must be Proven.

However anxious the court may be to sustain such a meritorious and proper investment made at the instance of the wife, as the answer of appellants alleges, still it cannot be done in the absence of

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all proof showing that the allegations of the answer are true and that such investment was made.

Slaves—Free Negro Cannot Hold.

No free negro was capable of acquiring in fee, or holding for any length of time, any slave other than the husband, parent or descendant of such free negro.

APPEAL FROM WASHINGTON CIRCUIT COURT.

October 17, 1871.

OPINION BY JUDGE PRYOR:

The will of Noah Reed under which appellant qualified as executor, empowered him to sell the land devised to Harriet Evans and her children and to invest the money in a safe manner for their benefit. The language of the will is: "I will and bequeath to Harriet Evans twenty acres of land to be hers and her children, etc." If she, Harriet, should prefer selling the land I authorize my executor to sell it for her and invest the money in any safe manner for the benefit of her and her children." The discretion to be exercised as to whether or not a sale is to be made of the property is left with Harriet Evans alone, but the power to sell and re-invest the proceeds is with the executor, he only is authorized to make the sale, and when made, to invest the proceeds in a safe manner for Harriet and children, he assumed upon himself this duty and undertook the execution of the trust.

The petition fails to state that the devisee Harriet and her children were free persons of color, or that the husband of Harriet was not the father of these children. The answer, however, states that they were free persons of color, and that Harriet's children were born previous to her marriage with Charles. When this purchase of Charles was made (of which there is no proof), no free negro was capable of acquiring in fee, or holding for any length of time any slave other than the husband, parent, or descendant of such free negro. 2nd vol. Revised Statutes, page 360.

The wife in this case had a life estate in the land, but at its termination the right to the use and possession together with the title was in her children. The proceeds of the land had been

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invested in property over which they had no control, and in that species of property, in which they could acquire no title whatever either legal or equitable. The marriage took place as the answer admits, after the publication of the will and no presumption can be indulged in that Charles was the father of the children, and however anxious this court may be, to sustain such a meritorious and proper investment made at the instance of the wife, as the answer of appellant alleges, still it cannot be done in the absence of all proof showing that the allegations of the answer are true and that such an investment was made, and when by such a judgment the children would be deprived of any and all interest in the property alleged to have been bought with the proceeds of the sale of the land.

The intention of the deviser was to give Harriet a life estate in the land with remainder to her children. The case of Carr vs. Estill, 16 B. Monroe, Turner vs. Palmer, 5th, Dana, McNans, Admr., vs. Watkins, 4 Bibb. are referred to as sustaining this construction of the will. There is no error in the judgment of the court below and the same is therefore affirmed.

Hays, for appellant.

Cunningham, for appellee.

W. U. PRATT, ETC., v. PEYTON COX, ETC.

Infants—Defective Sale of Land—Legislative Power to Enact Laws Confirming Sale—Parole Sale by Father.

The legislature has power to enact laws authorizing the courts of the county, by proper proceeding, to confirm defective sales of infants' real estate, and that, too, in cases where the sale under the original judgment did not divest the infant of title, and the legislature can confer upon a court of equity the power to execute and consummate a parole contract as against infants, made by the father, if from the proof the court deems it beneficial to the infant.

Fraud, Statute of—Repeal of—Parole Contract May be Enforced.

The statute of frauds is subject to be repealed at any time by the law-making power, and a parole contract for the sale of land be enforced like any other contract. Parole contracts are valid for many purposes.

APPEAL FROM HOPKINS CIRCUIT COURT.

November 11, 1871.

OPINION BY JUDGE PRYOR:

It is now too late to question the constitutionality of the legislative enactment under which the land in controversy was decreed to be sold by the chancellor. This court in several previous adjudications on the subject has determined in favor of the exercise of this power by the legislature. In the case of *Thornton vs. McGrath*, 1st Duvall, page 354, this court decided that the legislature had the power to enact laws authorizing the courts of the county by a proper proceeding to confirm defective sales of infants' real estate and that too, in cases where the sale under the original judgment, did not divest the infant of title. We are of the opinion that the legislature could confer upon a court of equity the power to execute and consummate a parol contract as against infants, made by the father if from all the proof the court deemed it beneficial to the infant. The statute of frauds is subject to be repealed at any time by the law-making power and the parol contract for the sale of land, can be enforced like any other contract. A parol sale of land is not void.

The statute only declares that no action shall be brought upon such contracts, and they are valid for many purposes. *Morrow vs. Johnson*, 3 Met. 578. In this case Edwin Ruby, the ancestor of the appellants, was the owner of 1,100 acres of wild and unimproved land; he had purchased this land in 1840, at fifty or sixty cents per acre; his brother-in-law Cox, the appellee had been unfortunate in his business affairs and surrendered up to Ruby his (Cox's), own land to be sold in order to relieve him from his liabilities. In 1841 he went upon this land of Ruby's under a parol contract by which he was to have all of that portion of the land within a certain boundary at the same price Ruby paid for it, provided he would build a mill upon the land. Cox entered upon this boundary of land in 1841; he erected a mill, dwelling house and made other improvements, a mill there doubtless in the neighborhood was very desirable and added to the value of the land. The contract is clearly proven and also

the declaration of Ruby not long previous to his death that he intended to make Cox a deed. He died suddenly in 1849 without ever having complied with his contract and shortly after his death, this legislative enactment was obtained authorizing the Chancellor of the Hopkins Circuit, to confirm the sale, if not prejudicial to the infant. The suit was instituted under the act and the most of the proof offered was from those who were or ought to have been interested in protecting the rights of the infants. The court after hearing the case directed the commissioner to make to Cox a deed for the land, and he and his vendees have been in the undisturbed possession of it since the year 1841. This present bill of review alleges fraud in the procurement of the act and the judgment of the Hopkins circuit court under it. The only proof on the subject is that the land was at that time worth from four to six dollars per acre, whilst for the defendants it is shown that it was worth only one dollar per acre. Cox never would have gone on this land and made such improvements, without some contract with the owner, and in the absence of any direct proof the presumption would be that some contract had been made, as the improvements were worth according to the proof of the appellant, more than half as much as the land. There is some conflicting proof as to the exact location of the boundary, to which appellant Cox was entitled, but there is nothing in the case showing any material difference in the value of the land, and therefore the interests of the infants could not have been prejudiced. We think, however, that the boundary is sufficiently shown, and that the deed by the commissioner covered the land which Cox was entitled to under his parol agreement. We perceive nothing in the case presenting any equity in behalf of the appellants. The appelle and his vendees have been in possession now nearly thirty years and there is no reason for interfering with the title under which they hold. The judgment of the court below dismissing appellant's petition is affirmed.

Vance, Gordon, for appellant.

R. T. Petrei, John Rodman, for appellee.

SAMUEL REDDING, EX'R, v. MARY ALSOP, ETC.

Wills—Specific Devise of Land and Subsequent Sale by Testator—Presumptive Ademption—Prima Facie Presumption May be Repelled by Proof.

"It is my desire that after the payment of my debts and said legacy, all the remaining part of my estate, in the state of Mississippi, both real and personal, be sold by my executor and converted into money, and said money be applied by my executor to buy land in the state of Ohio for Mary and her six children." After the publication of the will the testator sold the most of the property devised to Mary, himself, and took notes therefor with a lien on the land. The executor collected the notes and claims that the sale by the executor was a revocation of the devise. Held, that a specific devise of land and a subsequent sale of the land by the testator and an appropriation of the proceeds to his own use, nothing else appearing, would be a presumptive ademption of the devise. But that prima facie presumption may be repelled by extrinsic proof that a revocation of the devise was not intended. Nothing but the power to sell was devised to the executor, and nothing but the proceeds of the sale was bequeathed to the testator's children and their mother. The bequest to them was a demonstrative legacy, not revocable by a mere ademption of the security.

APPEAL FROM WASHINGTON CIRCUIT COURT.

December 21, 1870.

OPINION BY JUDGE PRYOR:

Jesse Alsop, a citizen of Washington County, Kentucky, owning a large estate, real and personal, in the State of Mississippi, on the 2nd of January, 1856, published his last will whereby, among other things, leaving no legitimate descendants, but a colored woman and children recognized by him as his. He made the following provisions for their benefit, after payment of his debts and a legacy of two thousand dollars to a nephew.

"It is my will and desire that after payment of my debts and said legacy, all the remaining part of my estate in the State of Mississippi, both real and personal, be sold by my executors and converted into money as soon as practicable at such time and on such conditions as my executor may think best for the interest of my estate, and said money to be applied by my executor to buy land and real estate in the state of Ohio, for Mary

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and her six children, that is Virginia, Malina, Ann (called Puss), Mortimer, Sam, Cleo and Elizabeth, whom I have heretofore emancipated and set free in said State of Ohio and who now resides in Clearmont county, Ohio, and that I may not be misunderstood it is my will and intention, that after all my just debts are paid and the before mentioned legacy, the estate I own in Yazoo and Madison counties in the State of Mississippi or in any other county in said State of Mississippi shall be converted into money, and the money invested in lands and other real estate in the State of Ohio by my executor, the same to be conveyed to the said Mary and her six children above named equally the portion conveyed to Mary to go to her six children or their heirs equally after her death, and I do hope that my executor or whoever may act in that capacity should the executor appointed by me die or fail to act, carry out my wishes in this clause of my will, as it is the great desire of my heart."

The will nominated Samuel Redding executor and also bequeathed to him all the testator's estate in Kentucky.

After the publication of the will the testator himself sold the most of his estate in Mississippi and took promisory notes secured on the land sold. Redding, as executor, afterwards made settlements in Mississippi by which he was adjudged indebted to the estate \$11,735.29, but Redding, claiming that as the notes were in Kentucky where the testator died in September, 1856, he, himself, was entitled as legatee to the amount collected on them, failed to apply any portion of it to the use of the colored legatee and in this suit brought by them to enforce payment to their use, they obtained judgment for the amount found due by the Mississippi settlement. The appeal from that judgment involves two principle questions for revision. First—the sufficiency of the petition; second—the alleged ademption of the legacy by the sale of the lands in Mississippi by the testator after the publication of his will. Neither of these grounds is sufficient to authorize a reversal.

First. The objection to the petition is that it does not show that the debts and such legacy had been paid nor that any thing or how much remained in the hands of the executor.

It alleges the settlement and that the balance was, as before stated, and that settlement implies that the debts and legacy had

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been paid and allowance made for them. Had there been any substantial defect in the petition the answer, not denying the settlement or adjudged balance, claims that admitted balance under the legacy to Redding and does not pretend that either the legacy of \$2,000.00 or any debt remained unpaid. Moreover the proof admissible under the petition, establishes all the essential facts as litigated on the petition and answer and shows among other things, a receipt for the legacy of \$2,000.00 as paid before the settlement and of course out of the Mississippi land as directed by the will. It is therefore too late now to claim that legacy as a credit on the balance adjudged on the settlement.

Second. A specific devise of land and a subsequent sale of the land by the testator and an appropriation of the proceeds to his own use, nothing else appearing, would be a presumptive ademption of the devise. But that prima facie presumption may be repelled by extrinsic proof that a revocation of the devise was not intended. Waiving the question whether the devise in that case was specific there can be no doubt that the title to the Mississippi land was not devised but remained in the testator until he sold and conveyed it. Nothing but a power to sell was devised to the executor, and nothing but the proceeds of sale was bequeathed to the testator's children and their mother. The bequest to them was a demonstrative legacy not revocable by a mere ademption of the security. If there was any ademption at all, it was only of the executorial power to sell the land, and the testator thought fit to supercede that power in his representative and exercise it herself, not for the purpose of revoking his provision for the appellees, but for the evident purpose of securing its application in a mode more satisfactory to himself and safe to them. And the spirit of the will and parental purpose of the father will not allow a doubt that he never intended to revoke his legacy to his children, and leaving them destitute, and let the greater portion of his estate go undeviseed to comparative strangers, pretermitted, in his will. There was therefore no ademption. Upon the whole, it seems to this court, Judge Hardin not sitting, that the decree of the circuit court is right, and therefore the judgment is affirmed.

Hays & Brown, Harrison, for appellant.

Harwood, for appellee.

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THOS. RAGAN *v.* JAMES HUDSON'S ADM'R.

Principal and Surety—Principal's Authority to Sign Name of Surety to Note on Conditions—Obligee Without Notice of Condition.

The principal obligor was the agent of his surety to sign his name to the note and deliver it, but not to do so until Stevens signed it. The obligee had no notice of the promise upon the part of the principal and cannot therefore be affected by their agreement.

APPEAL FROM KENTON CIRCUIT COURT.

April 13, 1871.

OPINION BY JUDGE PETERS:

This was an action upon a note purporting to have been executed by appellant and others to appellee's intestate, appellant pleaded *non est factum*, and on the trial in the court below appellee introduced Waller the principal obligor as a witness, who proved that he signed the name of appellant to the note under a verbal authority from him to do so, as his surety. He was then asked by appellant if at the time he gave him the authority to sign his name to the note, he did not give that authority with a condition annexed, to the answering of which appellee's attorney objected, and thereupon the court required appellant's attorney to state what he expected the witness would prove in answer to the question, and he stated that he believed the witness would prove, if permitted to answer the question, that appellant authorized him to sign his name to the note on the condition that he got Milton Stevens to sign it first. On that avowal the court sustained the objection, and refused to permit the witness to answer, to which appellant excepted, and whether the court below erred in that decision is the principal question presented by this appeal.

Admitting that the witness would have proved the facts as stated by the attorney, still if they were not competent as evidence, appellant was not prejudiced by the ruling of the court below.

The note as copied in the record before us, does not show that the name of appellant was signed to it by an agent at all, nor is it shown that appellee's intestate knew that any agency was employed in the transaction but it is shown that Waller acted

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as the agent of appellant, and that he delivered the note to appellee's intestate, who was ignorant of the matter in which appellant's name was signed to it, and of any condition if one existed, upon which his name was to be put to it. If appellant had himself signed the note upon the express promise on the part of Waller, the principal that he would not deliver it until he procured the name of Stevens to it, and he had violated that promise and delivered the note without the name of Stevens, and appellee's intestate had been ignorant of the promise he would still have been bound notwithstanding the fraud of his principal as this court has repeatedly decided. *Smith vs. Moberly*, 10 B. M. *Millet v. Parker, etc.*, 2 Met. 608 and subsequent cases.

And in principal and analogy there can be no difference between those cases, and this. Here the principal obligor was the agent of appellant to sign his name to the note and to deliver it, but not to do so until Stevens signed it. In this case the agency was enlarged and the obligee without notice of the promises on the part of the agent to his constituent cannot be affected by their agreement.

As therefore the evidence was incompetent, appellant was not prejudiced thereby.

The judgment must be *affirmed*.

Handy, for appellant.

Carlisle & O'Hara, for appellee.

WM. J. RUSK v. MILTON W. GRAVES.

Vendor and Purchaser—Deficit or Surplus—Mistake or Fraud.

It is well settled that unless there is mistake or fraud in the conveyance of land, or the deficit or surplus is so great as that if the same had been known the sale would not have been made, on the terms expressed, relief will not be granted.

APPEAL FROM KENTON CIRCUIT COURT.

January 30, 1871.

OPINION BY JUDGE PETERS:

The terms of the deed from appellee to appellant indicate that the sale was in gross, and not by the acre, and that conclusion

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is sustained by the evidence of Furber, the draftsman of the deed.

He says, after he read the deed, appellee remarked that there was a mistake in the deed from his vendor to him as to the quantity recited, that there were only about 20 acres in the tract instead of 23 A 3R 228 poles as stated in his deed, and after the parties had discussed the question of quantity a while, Graves insisting that the statement of the quantity should be corrected, he then suggested the insertion of the words, "more or less" to obviate the difficulty, which the parties acquiesced in, and he, accordingly, inserted them.

In conveyances of this character, it is well settled that unless there is a mistake, or fraud, or the deficit, or surplus is so great as that if the same had been known the sale would not have been made on the terms expressed, relief will not be granted.

In this case appellant got the boundary of land he contracted for; there was no fraud on the part of Graves, for before the deed was signed he announced in the presence of and to appellant that there was only about 20 in the boundary, saying that there was an error in his deed in reciting the quantity, and after that appellant accepted the deed with full information on the subject, and with the words "*more or less*" inserted for the express purpose of avoiding the very difficulty which is now attempted to be made. And besides in the suit brought to enforce the vendor's lien against appellant he never made any question as to quantity, or title, but submitted without resistance to a sale, and purchased the whole of the land for the unpaid price after he knew there was not as much land as he now claims to have purchased under the original contract.

All the facts and circumstances in this case tend to show that there was neither fraud, nor mistake in the contract and appellant is not entitled to any relief. Wherefore, the judgment is affirmed on the original appeal and reversed on the cross appeal, with directions to dismiss appellant's petition.

Rankin, for appellant.

Muezils & Furber, for appellee.

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WM. PEAY'S ADM'R v. JOS. WINTER'S HEIRS, ETC.

Descent and Distribution—Suit Against Heirs or Devisees—Liability of Decedent—Demand.

Heirs or devisees may be sued by a creditor for any liability of the decedent, and the failure to make a demand is not an available ground for dismissing such an action.

APPEAL FROM MARSHALL CIRCUIT COURT.

November 14, 1871.

OPINION BY JUDGE PRYOR:

The court below erred in sustaining the demurrer of appellees to the amended petition of appellant. Section 10 of Chap. 40, 1st Vol. Revised Statutes provides that the heir or devisee may be sued in equity by a creditor for any liability of the decedent. In *Johnson v. Belt*, 4th Bush 406, this court also decides "that a failure to make a demand is not an available ground for dismissing such an action, and that the provisions of the civil code upon this subject is restricted in its application to suits against personal representatives. The judgment of the court below sustaining the demurrer to appellant's amended petition is reversed, and cause remanded for further proceedings not inconsistent with this opinion.

Palmer, for appellants.

JOHN H. PAGE v. E. P. NEAL & Co.

Bills and Notes—Parol Release of Obligor—Evidence Must be Clear.

An obligor in a note may be released by parol, and the fact may be established by parol evidence, but such evidence should be clear, satisfactory and to the point, and if it does not come up to this standard it may be outweighed by the conduct and admissions of the party.

APPEAL FROM ALLEN CIRCUIT COURT.

October 30, 1871.

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OPINION BY JUDGE PETERS:

Early in the year 1857, appellant sold to appellee and Uriah Porter a large and valuable estate in lands, slaves, stock, crops, etc., all valued at \$83,333.35 for which sum they executed their joint not payable the 1st of January, 1877, and at the same time executed twenty notes to appellant for five thousand dollars each one falling due the first day of January, 1858, and one on the first day of each January successively until, and including the 1st of January, 1877; the notes for \$5,000 each, being for the interest on the principal debt.

The interest notes were paid up to, and including the year 1867 by Porter. This suit was brought by E. P. Neal, one of the obligors in said notes in 1868 against Page and Porter, to enforce an alleged contract on the part of Page to release and discharge him from the obligation, in consideration that he, Neal, who was a joint-purchaser of the property with Porter, would sell and convey all his interest in said property to Porter which Page desired that he should do and he alleges that in consideration of the promise by appellant to release him as aforesaid he did sell, and convey all his interest in the whole estate purchased of appellant to Porter on the 28th of October, 1858, except a slave named Aaron, whom Porter gave up to him to make the conveyance.

The court below granted the relief sought, and Page prosecutes this appeal.

The deed from Neal and wife to Porter for all of Neal's interest in the estate is exhibited and the consideration for said conveyance as therein recited in the sale and delivery of the slave Aaron valued by the parties at one thousand dollars. No other consideration is expressed in the deed, and appellant declares that on that day he had sold and thereby conveyed and released to Porter all right, title and claim he had to the property conveyed to them by J. H. Page and after that, viz, on the 27th of January, 1859, Porter executed an obligation to Neal with Joseph W. Hester, Sebastian Hester and Luther Porter as his sureties, in which it is stated that Porter and Neal had dissolved the partnership existing between them in the purchase of the Page property, the said Porter having agreed to take all of said

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property, and to pay the stipulated price therefor with the interest accruing thereon, and Porter and his sureties undertake to indemnify and save harmless said Neal from the payment of said sums or any part thereof.

Appellant denies that he ever made any promise, agreement or contract to release Neal from his obligation to pay said notes.

The only evidence that there ever was any direct communication between Page and Neal is that of U. Porter. He states in response to a question asked him by Neal, that he cannot say that Page particularly urged him to buy out Neal, but he says he advised him to do so, assigning reasons therefor, and that about the time Neal and himself were on the trade, and before it was completed Mr. Page did agree to release Mr. Neal from all liability to himself he and Neal traded, that Judge Loving was to write the release, and that he would go to Bowling Green and get him to do it. He then says, "I told Neal myself that Page had agreed to release him, and it is my recollection, Page did too, though I can't say for certain about Page telling him so soon after this information was received by Neal that Page would release him from all liability to him (Page) if myself and Neal traded; he made me a deed for the property.

"I cannot say whether or not he was influenced to make the transfer by this agreement of Page, but he made the agreement shortly afterwards."

This deposition of U. Porter was taken the 6th day of May, 1870, about 16 months after he had filed his answer in the same suit, in which he stated that the only consideration in fact, and the only one expressed in the deed made to this defendant by plaintiff was the negro man Aaron valued at \$1,000. Said deed speaks for itself. This defendant does not know, and cannot state what promise, or agreement said Page may have with plaintiff E. P. Neal in regard to such release to him and brother. If, however, the allegation in regard thereto made by plaintiffs be true, and they are released from all liability to said Page on account of their suretyship to this defendant, as they are, then this defendant has to say, their action against him is wanton, malicious, and iniquitous.

Stark proves that in a conversation with him Page told him that he had released Neal from all responsibility or liability to him.

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D. L. Porter proves that in August or September, 1858, he heard a conversation between U. Porter and Page, in which Page told Porter if he would buy out Neal he would release him. Neal was not present at this conversation, nor does it appear that the witness ever informed him of it. The evidence of these three witnesses is all that was admitted by the court below, proving any promises or agreements on the part of Page to release Neal.

On the other hand, appellant E. O. Neal in the two suits on two of the interest notes, one in the Warren Circuit Court, the other in the Louisville Chancery Court, against him and Porter, not only failed to plead, and rely on the alleged agreement of Page to release him from all obligation to pay any part of said debt, but placed his defense in both suits on wholly different, and much more uncertain, and unreliable grounds, if the release in fact had an existence, and of which, if there was such, he was well apprised when his answers were filled in the two cases referred to as he was when he filed his several petitions in this case.

But it is strange, and singularly impressive that appellant did not at once and without delay when he was sued in the Warren Circuit Court, which seems to have been the first one brought then set up this asserted release in a separate answer, independent of Porter whose interest was antagonistic to his, and not trust his defense to Porter and his attorney, instead of pursuing that course, which seems to be the only one a prudent man, attentive to his own interest would have taken, he according to his own testimony rested quietly on such defense as Porter might make. And in his answer in the suit in the Louisville Chancery Court sworn to by himself on the 19th of February, 1869, so far from relying upon and setting up any release as to bar a recovery against him, he, after claiming a credit for the value placed on the slaves in the contract, and a proportional deduction on the interest notes because of the amendments to the constitution of the United States, whereby the slaves were emancipated, he says, "The defendants (meaning himself and Porter) are entitled to have said sums referring to the interest on the estimated value of the slaves, which had been paid on the interest notes which had previously matured, and been paid, ap-

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plied as payments upon interest due upon the principal sum for which defendants are yet bound, etc." How he could be still bound if this theory of a release be true, or by what infatuation he was induced to swear to such language in the answer to a petition by which a judgment was sought on one of the very notes from the payment of which he claims now to be released, is wholly unexplained, for he then must have known as much about it as he ever did. He says that the release was a consideration for his deed to Porter on the 28th of October, 1858. But as to the affect of which counsel insists the court is mistaken as it was not acknowledged until January, 1859. We are certainly not mistaken as to its date, and the grantors declare that they did "this day" the day of the date of the deed conveyed, etc., in consideration of the sale and delivery to them of the slave Aaron, which certainly indicates that it took effect the day of its date. In that deed it is not stated that the release from Page to him formed any part of the consideration therefor nor that any such release was made and in his answer in the suit in the Warren Circuit Court by Page's assignee against him and Porter, his admissions of his obligations to pay said notes after crediting them by the interest on the value of the slaves are even stronger than those in the other suit, from the affect which he cannot escape for the reason that the answer was prepared by Porter. The consequences to him for such negligence is almost overwhelming. Besides if Page had released him it was wholly unnecessary that he should have acquired and that Porter should have executed the bond of indemnity to him with surety on the —day of January, 1859, and the fact that he took the bond is inconsistent with the theory that Page ever had released him.

U. Porter is the only witness who proves that Page had agreed to release Neal from said notes, and in less than a year and a half before he gave the deposition relied on, he swore to an answer, in which he stated he did not know and could not state that Page ever made any promise or agreement to release Neal.

Stark only proves that he heard Page say he had released Neal from the notes in the fall of 1858. This statement was made over ten years after the conversation occurred in which he says he heard Page make this statement. And D. L. Porter proves that in August or September, 1858, he heard Page say

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he would release Neal. This evidence we deem wholly insufficient to establish the alleged release, contradicted and weakened as it is by other potent and imposing facts.

We do not deny that an obligor in a note may be released by parol, or that a release may be established by parol evidence; but such parol evidence should be clear, satisfactory and directly to the point. The evidence in this case does not come up to that standard and is in our judgment outweighed by the conduct and admission of Neal, inconsistent with the fact that any such release was made.

Wherefore the judgment against Page is reversed, and the cause is remanded with directions to dismiss the petition as to him.

Barrett & Roberts, James, Leslie & Botts, for appellant.

Mulligan, Rodes, Pirile & Caruth, for appellee..

MOLLIE PRENTICE v. COMMONWEALTH.

Trials—Instructions Must be in Writing—No Particular Form—Given at Close of Evidence.

The trial court is, on motion of either party, required to instruct the jury on the law applicable to the case, and the instructions must be in writing, and in discharging that duty the court may adopt such instructions prepared by the attorneys as he may deem applicable, or he may reject all those thus prepared and write out such as he may deem applicable to the case, and this must be done when the evidence is closed. If the instructions present the law of the case in an intelligible manner, the power of the Court of Appeals over them ceases.

APPEAL FROM JEFFERSON CIRCUIT COURT.

June 22, 1871.

OPINION BY JUDGE PETERS:

This appeal presents but one question for the determination of this court, and that is, did the court below err in instructing, or in refusing to instruct the jury?

An amendment to Sec. 226, Criminal Code, provides that when the evidence is concluded, the court shall on motion of either

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party instruct the jury on the law applicable to the case which shall always be in writing.

In this case after the evidence was concluded both parties asked instructions all of which were refused by the court, and instructions given which were prepared by the court, to the giving of which appellant excepted.

By the section quoted from the Criminal Code: the court is required on the motion of either party to instruct the jury as to the law applicable to the case and the instructions must be in writing. In discharging that duty, the court may adopt such instructions prepared by the attorneys representing the parties, as he may deem applicable to the case, or he may reject all those thus prepared, and write out such as he may deem more appropriate and submit those to the jury, this he must do when the evidence is closed.

The objection of appellant's counsel is to the mode pursued by the court below in giving the instructions, more than any particular error contained in said instructions prejudicial to his client.

The exposition of the law given by the court certainly cannot be regarded as a charge or summing up in the common understanding of those terms. The instructions were given when the evidence on both sides was concluded, and not after the arguments of the attorneys were closed, and they present the law to the jury as favorable for appellant as those asked by her attorney, and quite as favorable to her as she was entitled to have them. Indeed no particular error prejudicial to appellant has been designated, or shown, but the principal objection seems to be the refusal of the court to adopt those prepared and presented by appellant's attorney, and the way in which those given are written, we may observe that the mode adopted by the court is somewhat unusual in this state, and the subject was too much elaborated, and not as perspicuous as is desirable in such cases; but it is not within the province of this court to prescribe forms in which instructions are to be given. If they present the law of the case in an intelligible manner to the jury, our powers cease. In this case we think that was done and therefore the judgment must be *affirmed*.

Jackson, for appellant.

Att'y Gen'l, for appellee.

Opinion of the Court.

J. C. YOUTSEY *v.* LEONARD TRAP.**Corporations—Personal Liability of Director Who Signs Company's Note as Such Officer—Joint and Several Liability.**

Where a note is signed by the obligors as president and directors of a corporation, and in the body of the note the parties jointly and severally agree to pay the money, and there being nothing pointing to the funds of the corporation as the source from which the obligee was to derive his money, they are jointly and severally liable. But where there is no joint and several obligation to pay, and the face of the instrument shows clearly that the intention was to bind the company only, and the instrument points directly to the revenue of the corporation as the source from which the money is to be derived, there is no individual liability on the officer.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 15, 1872.

OPINION BY JUDGE PRYOR:

The appellant on the 3d of August, 1864, executed to the appellee the following note, viz: We the president and board of directors of the Old State road and Bubble Creek Turnpike road company promise to pay to Leonard Trapp or order seven hundred and eighty-eight dollars and sixty cents to be due and payable on the 12th of October, 1867, all the resources and income of said road to be bound for the payment of the above note.

Signed,

JOHN C. YOUTSEY, Pres.,
JOSEPH WARREN,
JOHN BYRD,
WM. WARE,
JAMES SHAW,

Directors.

On this obligation suit was instituted by the appellee against the appellants and a personal judgment rendered by the court below, making them individually liable for the money. In the case of *Trask vs. Roberts*, 1 B. Monroe, page 201, the obligation to pay was signed by the obligors as President, and Trustees of the town of Harrodsburg, and in the body of the note, the parties jointly and severally agreed to pay the money. The court

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in that opinion refer to the fact that the agreement to pay is not only joint but several, *also*, showing indirectly that they intended to make themselves individually liable for the debt. In that case it is also said that there was nothing pointing to the funds of the town as the source from which the obligee was to derive his money. The case of *Whiting vs. Suddeth*, 2 Metcalfe, is analogous to the case of *Trask vs. Roberts*. The obligations in those two cases are unlike the one upon which this suit is instituted. In the present case, there is no *joint* and *several* obligation to pay and the face of the instrument evidencing clearly an intention to bind the obligors as president and directors of the turnpike road company only. The obligation is not only signed by the parties as president and directors of the company but the instrument itself points directly to the sources from which the money is realized, viz: revenues of the incomes of the road. A several liability must of necessity be personal, but here is a joint undertaking. We promise to pay, etc., and the income and revenues of the road to be bound for the payments for the note. We are of the opinion that these parties are not individually liable and that the corporation alone is responsible to the appellant. *Yowell vs. Dodd*, 3 Bush, page 581.

The judgment of the court below is reversed and cause remanded for further proceedings not inconsistent with the opinion.

Stevenson, Myers, for appellant.

GEO. REDMON v. H. C. MCGHEE & Co.

Vendor and Purchaser—Conveyance by Deed—Title Bond for Reconveyance—Vendee in Deed Trustee of Vendee in Bond.

When a party executes a deed of conveyance to another and takes a title bond from him to reconvey the property, upon the happening of a certain event, the vendee in the deed becomes the trustee of the vendee in the title bond.

Opinion of the Court.

Landlord and Tenant—Estoppel Lease of Land With Knowledge of Title Bond to Reconvey—Assignment of Lease.

The court erred in adjudging to H. C. Magee the possession of the farm of Gustavus until the expiration of the lease executed by I. Rowan to Breeze. The latter was fully apprised of all the circumstances attending the conveyance of the land, and was for several years the custodian of the bond for reconveyance, and the assignee of the lease was equally apprised of these facts.

APPEAL FROM HARRISON CIRCUIT COURT.

April 10, 1871.

OPINION BY JUDGE LINDSAY:

Gustavus S. McGhee intending to enter the military service of the confederate states, for the recited consideration of \$12,000 conveyed all his property, including a farm of 135 acres in Harrison county to his brother, I. Rowan McGhee, and took his bond for a reconveyance upon his return to Kentucky. The legal effect of this conveyance and agreement to recovery, was to constitute the vendee, the trustee for the vendor. I. Rowan McGhee executed to James Breeze a writing purporting for the recited consideration of \$1,000 to lease to him this trust farm for the term of ten years from the 30th of November, 1861. On the 20th of March, 1865, Breeze assigned said lease with all its advantages to the appellee H. C. McGhee.

In 1862 I. Rowan McGhee departed this life, having first made and published his last will and testament, by which, after several specific bequests he devised the residue of his estate to his brother Gustavus S. McGhee, his nephew Thomas T. McGhee and the infant children of his deceased sister, Mrs. Nicholas, leaving nothing to his brother, H. C. McGhee.

This action was brought by the guardians of the infant devisees to procure a division of the land of I. Rowan McGhee in accordance with the provisions of his will. The division was made, and that portion of the Bracken county farm upon which the testator resided which was allotted to Gustavus was subjected to the payment of his debts by proper proceedings, and purchased at decretal sale in June by appellee, H. C. McGhee. In 1864 Gustavus was killed in an engagement with the United States troops in East Tennessee. This fact was suggested by

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an amended petition filed in May, 1865, and the appellee, H. C. McGee, who was his brother and one of his heirs was made a party to the proceeding. He answered claiming that the 135 acres of land in Harrison county conveyed by Gustavus to I. Rowan did not pass by the latter's will, and that he was entitled as heir at law of Gustavus to a portion of the same. Also that under the will of his Mother Nancy Magee, both I. Rowan and Gustavus had received of her estate the sum of \$2,419.60 each, that said will provided that in case any of her devisees died without decedants, the portion received by them should revert to the surviving devisees or their descendants, and that both of his said brothers had died without ever having been married, and he claimed that he ought to recover from the estate of each his proportionate share of the amounts so received by them under their mother's will. By an amendment subsequently filed he made his answer a cross petition against devisees of I. Rowan who were with him co-heirs of Gustavus, and sought to subject their interests in the lands acquired from them to the payment of his said claim. By a subsequent amendment he set up the fact that the lease executed by I. Rowan to Breeze had been assigned to him, and asked to be protected in the enjoyment of the Harrison county land until the expirations of said lease. Under the circumstances we are not inclined to disturb the action of the circuit court, in adjudging to appellee the rents accruing on that portion of I. Rowan's Bracken county lands, allotted to Gustavus, and bought by appellee from the date of his purchase in June, 1866. The court was also right in saying that so far as Gustavus' estate was concerned, his heirs were equally benefited whether they took the amount he received from his mother's estate, as his heirs or by virtue of his mother's will, hence the formality of an adjustment under the provisions of said will was useless. It was not so however as to I. Rowman's share, as H. C. McGee took nothing under his will.

At the time of the death of I. Rowan there were four of the devisees of his mother, or their representatives left to share the amount he had received from her, viz: H. C., Gustavus and Thos. T. McGee and the children of Mrs. Nichols, consequently H. C. McGee was entitled to recover from his estate one fourth of \$2,419.60, viz: \$604.90, with interest from date of

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his death, and in case the personal representative of I. Rowan McGhee had not paid over to Gustavus his portion of this fund, then H. C. McGee has the still further claim against I. Rowan's estate for one-third of the same, viz: \$207.63 with interest from the date of I. Rowan's death. The record does not disclose the fact as to whether or not such payment was made to Gustavus, and upon the return of the case, said fact should be ascertained, and in order to do this the personal representatives of Gustavus should be made a party to this proceeding. But the lands of the appellants should not be subjected to the payment of these claims until it is ascertained that the personal representatives of I. Rowan and Gustavus McGhee have not in their hands sufficient personal assets to satisfy the same.

We think the court erred in adjudging to H. C. McGee the possession of the farm of Gustavus until the expiration of the lease executed by I. Rowan to Breeze. The latter was fully apprised of all the circumstances attending the conveyance of said land, and was for several years the custodian of the bond for reconveyance. H. C. McGhee to whom he assigned his lease, was equally well apprised of these facts. Breeze swears that in February, 1865, one month before he assigned the lease to H. C. he delivered to him I Rowan's obligation to Gustavus to reconvey. It is also remarkable that although Breeze's deposition is twice taken, he no where states that he ever paid I. Rowan one cent for said lease, nor that H. C. paid him anything for the assignment of the same. In fact H. C. in his amended answer setting up this assignment contents himself with stating that he purchased from Breeze for a valuable consideration, without stating what it was, and the written assignment of Breeze on the back of the lease does not acknowledge the payment of one cent, nor state that there was any consideration for the same either paid or to be paid. The record developes a further fact.

The amended answer of appellee setting up the assignment of said lease was not filed until H. C. had been in court more than a year, during which time he had filed his original and first amended answer. We are of opinion that neither Breeze nor H. C. McGee regarded the lease as valid or binding on the heirs of Gustavus because of the fact that they both knew it was executed without consideration. Nor was the court below bound

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to uphold and enforce the lease because of the fact that there was no pleading upon the part of the appellant assailing it.

H. C. McGhee pleaded the lease as a matter of avoidance, and not as a set-off or counter-claim. He admitted the right of the appellants to have partition of the land, for the sole purpose of postponing them in the enforcement of a conceded right. The law traversed every defense relied upon by his answers, and the appellants had the right to attack the lease upon any legal ground they chose, and by any competent evidence they might be able to produce. In addition to this all the circumstances in the case indicates that the lease was intended for no other purpose than to effectuate the trust under which H. C. McGhee claims title, and if he be allowed to establish his claim by relying upon the trust he ought not to take advantage of the means used to effectuate it to obtain an undue advantage over those whose rights are equal to his own, and to that extent to defeat it.

Upon the return of the case he should be allowed a reasonable time to take such proof as he may desire, to show that the lease was a bona fide transaction between I. Rowan McGhee and Breeze executed upon an actual consideration, and in case he is not able to satisfactorily establish these facts, the lease should be wholly disregarded. Wherefore the judgment of the court below is reversed and the cause remanded for further proceedings consistent with this opinion.

A. H. Ward, for appellant.

Boyd, for appellee.

JOHN W. SMALL, ETC. v. C. F. BRYLAND, ETC.

Appeals and Errors—Reversal—Amended Answer Not Sufficient to Review Decision—Relitigation.

An amended answer after the return of a case from the Court of Appeals cannot be regarded as an original pleading or an appropriate petition for reviewing or relitigating the questions involved by the decision of the Court of Appeals, and which by the mandate the Circuit Court was required to carry into effect.

APPEAL FROM CAMPBELL CIRCUIT COURT.

December 12, 1870.

Opinion of the Court.

OPINION BY JUDGE HARDIN :

The amended answer offered and rejected after the return of the cause from this court cannot, we think, be properly regarded as an original pleading or an appropriate and sufficient petition for reviewing or relitigating the questions involved by the decision of this court, and which by the mandate of this court, the circuit court was required to carry into effect.

The withdrawal by the appellee of the notes on Ogden under the order of the court, and which he might have been, but was not required by rule, to return or account for, would not alone have constituted a ground for enjoining or modifying the decision of the court, to be made in conformity to the opinion of this court, if appropriately set up for that purpose.

But whatever might be the right and remedy of the appellants in the event of the collection, or appropriation of those notes by the appellee, we are satisfied the amendment tendered was rightly rejected.

Therefore the judgment is affirmed.

Hallam, Stevenson, for appellants.

Myers, Webster, for appellees.

THOMAS SHACKLEFORD v. THOMAS LANDRUM, ETC.**Set-off and Counter-claim—Striking Files—Agreement.**

An order striking out all claims of set-off relied on by the parties, which purport to have been done by joint consent, will be upheld on an appeal, in the absence of a motion in the lower court to set it aside.

APPEAL FROM McLEAN CIRCUIT COURT.

April 21, 1871.

OPINION BY JUDGE HARDIN :

The order made on the 13th of March, 1868, striking all claims of set-off relied on by any of the parties, purports to have been entered by their joint consent, and is not shown to have been made through fraud or mistake, and was never set aside, nor did

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the appellant seek to vacate it before the final judgment was rendered.

We must therefore regard the set-offs plead by the appellant, as voluntarily withdrawn by him; and this being so the judgment being rendered on the pleadings and evidence of title seems to be correct.

Wherefore the judgment is affirmed.

Owen, for appellant.

Tanner, for appellees.

WILLIAM SHORT'S EX'R v. CATHERINE SHORT, ETC.

Willie—Sale of Real Estate to Provide Income for Wife—Funds to be Raised Not Devised.

Where a will directs the sale of the testator's real estate to provide an income for the use of the widow for life, neither the principal funds to arise from the sale nor the personal property is devised.

APPEAL FROM HARDIN CIRCUIT COURT.

May 15, 1871.

OPINION BY JUDGE HARDIN:

As we construe the will of William Short, it simply authorizes the sale and conversion of the testator's real estate to provide an income for the use of his widow for life, charged also with the provisions made in the will for his children; and that neither the principal funds to arise from the sales of land, nor the personal estate was devised.

The opinion and judgment of the Circuit Court being inconsistent with this construction of the will, the judgment is reversed and the cause remanded for a judgment in conformity with this opinion.

Brown & Murray, for appellant.

Opinion of the Court.

JOSEPH RICHARDSON *v.* COMMONWEALTH.**Intoxicating Liquors—Keeping Tippling House—Selling for Another.**

The liquor sold by appellant belonged to Mrs. De Spain, and was sold by appellant for her in her barroom, where she had a lawful right to sell it; and there is an utter failure to make out the offense of keeping a tippling house against him.

APPEAL FROM GREEN CIRCUIT COURT.

December 11, 1871.

OPINION BY JUDGE PETERS:

Appellant was indicted in the Green circuit court for keeping a tippling house, and on the trial was found guilty of the offense charged, and judgment rendered against him for sixty dollars.

It appears from the evidence that appellant, attendant at the bar of Mrs. Despain, who was at the time a tavern keeper with a license to sell liquor at that place during the May election, 1869, and sold liquor for her which was drunk at her tavern house and that was all the selling he did.

The liquor sold by appellant belonged to Mrs. Despain, and was doubtless sold for her in her barroom where she had the lawful right to sell it, and there is an utter failure of proof to make out the offense of keeping a tippling house against appellant.

But from the argument of counsel, and the last paragraph of the instruction given by the court to the jury, it would seem that although indicted for keeping a tippling house he was fined for selling liquor without having taken the oath prescribed to be taken by persons applying for license to keep a tavern before such licenses shall be granted to them, under the act approved February 21, 1863, Myers' Supp. 518. The reason for that law requiring that oath to be taken has ceased, and the law itself may be regarded as inoperative if not within the spirit of the act approved February 15, 1866. Myers' Supp. 737.

But, if that were not so, this judgment cannot be sustained on another ground. By the third section of the act of 1863, *supra*, it is provided that for a failure to take the prescribed oath the persons described in the first and second sections thereof shall be subject to the penalties provided by law against selling by

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retail without a license, and to be recovered in the same way. And by section 1 of article 5, chapter 99, 2 R. S. 412, the punishment for selling by retail is a fine of twenty dollars for each offense.

The charge in the indictment was not in any view of the case sustained by the evidence. Wherefore the judgment is reversed and the cause is remanded with directions to dismiss the indictment.

J. C. Rush, for appellant.

R. RICHARDSON v. D. SHELDON, ETC.

Will—Intoxication—Mental Capacity—Undue Influence—Revocation Prevented.

A judgment, based on a verdict setting aside a will, will not be disturbed where the proof shows that the testator was old and of intemperate habits at the time of the execution of the instrument, especially where he was under the influence of his wife, and from the further fact that the paper was carried to another state and eventually fell into the hands of the appellant, which perhaps prevented its effectual revocation.

APPEAL FROM KENTON CIRCUIT COURT.

April 11, 1871.

OPINION BY JUDGE HARDIN:

Although the weight of the evidence conduces to the conclusion that Otho Richardson dictated the paper in contest, as his will, and although then intoxicated, he possessed sufficient mental capacity to make a valid will, if wholly free from undue influence. We do not feel authorized under all the circumstances of this case to reverse the judgment of the circuit court, founded on the verdict of a jury who heard the evidence.

It does not appear that the testator's daughters were not all equally worthy of his bounty with the appellant, the favored devisee, and the gross inequality in the devises of the will is only explained by the fact that the testator's age and intemperate habits operated to subject him to the influence of his wife and son residing with him, the former of whom was un-

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friendly with his daughter who, having married, were separated from him.

It seems that at her suggestion he placed the paper in the hands of a particular person, who carried it to Illinois, and that this circumstance, and the fact that it afterwards fell into the hands of the appellant perhaps prevented its effectual revocation.

These and other facts disclosed on the trial no doubt led the jury to the very reasonable conclusion that the paper in contest was not at first the result of the free and unbiased judgment and deliberate intention of Otho Richardson; and, considering the peculiar and superior advantages which the jury and court below had for determining the weight of the evidence, we are constrained to concur in their decision.

Wherefore the judgment is *affirmed*.

Collins & Drane, for appellant.

Ellis, for appellees.

MALINDA B. PASSMORE, ETC., v. JOHN K. WILSON.

Husband and Wife—Mortgage—Separate and General Estate of Wife—Burden of Proof on Grantor to Show Separate Estate.

The burden of proof is on the grantor in a mortgage to show the property to be a separate estate, in order to exempt it from the operation of a mortgage.

APPEAL FROM MERCER CIRCUIT COURT.

October 14, 1871.

OPINION BY JUDGE HARDIN:

The allegations of the petition import that the property mortgaged was the general estate of Mrs. Passmore, and as she might convey such estate by mortgage, whether for necessities or not, the only question that could arise in the case, as presented, is whether the property is general or separate estate.

On that question the burden was upon the grantors in the mortgage to show the property to be separate estate in order to

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exempt it from the operation of the mortgage, and this they wholly failed to do.

Kyle, for appellants.

J. B. & P. B. Thompson, for appellee.

JAMES D. STEELE, ETC., v. COMMONWEALTH, ETC.

Execution—Priority—Levy—Sheriff's Failure to Endorse.

It is not essential to the validity of the levy of an executor that it shall be endorsed on the execution, and a sheriff may sell under a levy so made, to the exclusion of an execution levied at later date, notwithstanding the levy was endorsed on the latter one.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

January 17, 1871.

OPINION BY JUDGE HARDIN:

Although it was not essential to the validity of the levy of Rogers execution that it should have been endorsed on the execution, and the sheriff might have sold under a levy so made and not endorsed on the returned execution, and to the exclusion of the execution of the appellees of later date than the alleged levy but prior in date to the second execution of Rogers. The levy under which the land was sold, endorsed on the last execution of Rogers dated June 14, 1867, does not purport to be, nor is it shown to have been priorily made, but whatever may have been the intention of the deputy sheriff in relation to levying the junior execution of Rogers, the levy was endorsed and dated, is clearly a levy of that execution and of that date, and ought not to have been made, as it was an execution junior in date to that of the plaintiff which was at the time in the sheriff's hands and to its exclusion, and the decision of the circuit court sustaining the demurrer to the answer being in accordance with this view does not seem to have been erroneous.

Therefore, no error being perceived, the judgment is *affirmed*.

McPherson, for appellants.

Feland, for appellee.

Opinion of the Court.

JACOB SMITH *v.* DANIEL SCOTT.**Payment—Receipt—Contract—Illegal Consideration—Confederate Money—Duress.**

The admitted receipt of the defendant for one hundred dollars in Confederate money, to go as a credit on notes which the defendant held on plaintiff, imports a contract and was obligatory, unless the consideration was illegal or the execution of the receipt was procured by duress.

APPEAL FROM PIKE CIRCUIT COURT.

May 8, 1871.

OPINION BY JUDGE HARDIN:

The admitted receipt of the defendant for one hundred dollars in confederate money to go as a credit on notes which the defendant held on the plaintiff, imports a contract to give the credit for one hundred dollars, and was obligatory, unless the consideration was illegal or the execution of the receipt was procured by duress, as alleged in the answer.

The transaction occurred during the occupation of the southwestern portion of Kentucky by the confederate armies in September, 1862, and within their military lines, and the ruling of the court as to the legality of the consideration seems to have been strictly in accordance with the decision of this court in the case of *Martin v. Hortin*, 1 Bush 629, and recognized in *Rodes v. Partillo*, 5 Bush 271. And as we perceive no available ground of objection to the instructions or rulings of the court on the question of duress, no sufficient reason appears for reversing the judgment.

Therefore the judgment is *affirmed*.

Apperson & Reid, Brown, for appellant.

Auxier, Hawkins, for appellee.

ANDREW HECKINGER *v.* CASSONIER HIBRICK AND WIFE.**New Trial—Newly Discovered Evidence.**

Although the affidavits of the witnesses by whom it is proposed to make proof of the newly discovered evidence conduces to show that the appellant was not apprised of the fact that he could make such proof by them, until after the rendition of the judgment against

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him, yet he does not state this to be a fact in his own affidavit, nor does he state any fact showing diligence on his part.

APPEAL FROM JEFFERSON CIRCUIT COURT.

June 9, 1871.

OPINION BY JUDGE LINDSAY:

Although the affidavits of the witnesses by whom it is proposed to make proof of the newly discovered testimony conduces to show that the appellant was not apprised of the fact that he could make such proof by them until after the rendition of the judgment against him, yet he does not state this to be the fact in his own affidavit, nor does he state, or attempt to show that he at any time prior to the trial and judgment used any diligence whatever to discover who was present at the time he was charged with speaking the slanderous words. It is possible that the excitement under which he was laboring at the time might have prevented his noticing the presence of these newly discovered witnesses, but by inquiring of Siebold or his daughters he might easily have ascertained the fact that these witnesses were present and, having ascertained this fact, it would have been his duty to inquire of them as to what they knew of the prosecution.

We are of the opinion the court did not err in excluding the testimony as to remarks or charges made by Hibrick against his wife. Such charges conduced to establish the truth of the slanderous words and as the plea of justification was not made, the testimony was inadmissible.

Judgment *affirmed*.

Woolley, for appellant.

Gibson, for appellees.

A. HEHEMAN v. SAMUEL B. SNEAD, ETC.

Partition—Apportionment of Cost of Improvement—Action to Recover—Necessary Parties.

All persons who by apportionment are to pay any part of the cost of improvements, for which liens are given, shall be made parties to any proceedings for the enforcement of such liens, unless they have paid their part of the cost agreeable to the apportionment, which fact shall be alleged in the petition.

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APPEAL FROM LOUISVILLE CHANCERY COURT.

June 15, 1871.

OPINION BY JUDGE LINDSAY:

The provisions of the act approved March 9, 1868, 2d Vol., Acts 1867-68, page 410, certainly prevent this case from coming within the principles governing the case of *Hydes, etc., v. Joyce*.

The 32d section of said act requires that all persons who, by apportionment, are to pay any part of the costs of improvements for which liens are given by sections 23, 24, 25, 26 and 45, shall be made parties to any proceedings for the enforcement of such liens, unless they have paid their part of the costs agreeable to the apportionment, "which fact shall be alleged in the petition." This allegation is properly made in the petition of appellee, but is specifically denied by the answer of the appellant.

The legislature saw proper to make the issue thus raised a material one. If any person liable by the apportionment to pay any part of the costs of the improvement by appellee had not paid the same and was not made a party defendant, the onus was upon the complaint to make out his cause of action by proof. Hence, in our opinion, the answer presented a good defense, and the court erred in sustaining the demurrer thereto.

Wherefore the judgment is reversed and the cause remanded for further proceedings consistent herewith.

Russell, for appellant.

Coke & Argegest, for appellees.

HYATT, MCCREADY, ETC., v. JOHN L. SCOTT.

Contracts—Allegations of Petition—Demurrer.

The appellee alleges in his petition that the stage of water in the Kentucky River was such that the coal could have been delivered after the first of October, 1867, and before the first day of March, 1868. He failed to designate the earliest date at which such delivery could have reasonably been made, and perhaps if this count had been taken or confessed, he would have been entitled under it to no more than nominal damage; therefore the instruction asked for was properly overruled.

Opinion of the Court.

APPEAL FROM JEFFERSON CIRCUIT COURT.

June 17, 1871.

OPINION BY JUDGE LINDSAY:

It is insisted that the judgment in this case should be reversed because the court below refused to instruct the jury; that the appellants were not bound to deliver the five barges of coal mentioned in the contract until a reasonable time "after there was such rises in the Ohio and Kentucky rivers as enabled the defendants to send it in the usual way from Pittsburg to Frankfort." Said instruction was prepared upon the idea that the contract was in legal effect an undertaking upon the part of Hyatt McCready & Co. to deliver to Scott at Frankfort the quantity of coal designated as soon after the date of the contract as they could reasonably transport the same in barges from Pittsburg to the place of delivery, the stage of water being considered.

If it be conceded that this is the correct construction of the writing sued upon, the question still remains to be determined whether, under the pleadings and evidence, the refusal of the court to give the instruction was such an error as will authorize a reversal.

Scott alleges in his petition that the stage of water in the Ohio and Kentucky rivers was such that the coal could have been delivered after the first of October, 1867, and before the first of March, 1868. He failed to designate the earliest date at which such delivery could have reasonably been made, and perhaps if this count in his petition has been taken for confessed, he would have been entitled under it to no more than nominal damages.

The answer, however, to some extent, cures this defect. The appellants deny that the stage of water in the Kentucky river was such, before the — day of January, 1868, as would have enabled them to comply with their contract. They make no mention whatever of the stage of water in the Ohio river and no defense is based upon the condition of that stream.

Still, we are of opinion that the failure of appellants to plead specifically as to the stage of water in the last named river did not dispense with the necessity of proof upon that point.

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The evidence is conclusive that the Ohio river at Carrollton from and after, about the 20th of December, 1867, was navigable for barges of coal being brought from above that point. This fact of itself would not establish that the rise in said river extended as far as Pittsburg, as the same might have been caused by the rise of streams flowing into the Ohio south and west of that city. But in addition to this, it is proved by the witness Spillman, who lived at the mouth of Kentucky river, that he bought at Cincinnati a barge of coal which reached Carrollton on the first day of January, 1868, and that he not only did not purchase after the rise in the Ohio had reached that city from Pittsburg, but that he waited for a decline in the price of coal.

W. B. Chinn, one of appellant's witnesses, states that coal began to decline in price on the 28th of December, 1867, because of the fact that "a rise at Pittsburg had brought down Pittsburg coal to Louisville about that time."

On the 24th of said month appellant, McCready, wrote to Scott that "coal was coming," and he is corroborated in this by the testimony of his own witness, Captain Milton, who swears that on the 28th of that month he, with the steamer Vaild, was in the Kentucky river with two barges of coal in tow, the same being the coal of his employes, Hyatt, and others. This chain of evidence proving unmistakably that barges from Pittsburg laden with coal had commenced reaching the mouth of the Kentucky river and points below on the Ohio on or before the 28th of December, 1867, is uncontradicted by any testimony whatever, either direct or circumstantial. Such being the case, a verdict based upon the idea that appellants could not, by the use of reasonable diligence, have brought coal in barges from Pittsburg to the mouth of the Kentucky river by the 1st of January, 1868, would have been flagrantly against the weight of the evidence, and it would have been the duty of the court to set it aside on that account.

There is some conflict in the testimony as to the stage of water in the Kentucky river, but this question was properly submitted to the jury. In view of all the facts presented by the record, we are of opinion that the error complained of (if it be

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an error) could not have prejudiced the substantial rights of the appellants.

Judgment *affirmed*.

Bullitt, for appellants.

Caldwell, Harlan, Scott, for appellees.

JAMES MCLAUGHLAN v. JAMES C. HOWARD, ETC.

Ejectment—Vendee Occupies No Better Position than His Vendor.

If appellant's vendor sanctioned the erection of the partition wall, he cannot occupy a more favorable position than he might if he had not conveyed the property.

Ejectment—Action—Adverse Holding—Acceptance of Deed.

If the defendant's position was that of an adverse holder and claimant of the ground, when the appellant accepted the deed, the plaintiff could not maintain his action.

APPEAL FROM KENTON CIRCUIT COURT.

June 21, 1871.

OPINION BY JUDGE HARDIN :

The evidence conduces to the conclusion that L. N. Sevians, the appellant's insolvent vendor, sanction the erection of the wall by Howard as a party wall; and if his coparceners did not also agree to or sanction it, they conveyed their interest to him, and he conveyed them, together with his own, as one of D. Sevians' heirs, after the erection of the wall, to the appellants. Thus acquiring the title we do not see how he can occupy a more favorable position in this case than his vendor might if he had not conveyed the property.

It seems to us, if the attitude of the defendant was that of an amicable occupant of the ground in dispute under the agreement for the erection of a party wall, that agreement should protect him from a recovery in this action at law, instituted as it was, without a demand for possession or an offer to rescind the agreement on equitable terms; and if his position was that of an

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adverse holder and claimant of the ground when the appellant accepted the deed of L. N. Sevians, the plaintiff could not maintain his action. The instructions and rulings of the court with reference to the facts disclosed, if liable to some criticism, were, in our opinion, substantially correct, and the motion for a new trial was properly overruled.

Wherefore the judgment is affirmed.

Fish, for appellant.

Benton, for appellees.

JOHN McCLAIN *v.* BURTON, MITCHELL & Co.

Bills and Notes—Co-obligor—Use of Name—Innocent Holder.

It is a well-settled principle that if one trusts another with his name as his surety as co-obligor, he must suffer the consequences of his confidence in him, rather than place the loss on the innocent holder of the note.

APPEAL FROM BOYLE CIRCUIT COURT.

September 13, 1871.

OPINION BY JUDGE HARDIN :

Whatever means T. P. Mitchell may have used to induce the appellant to become his co-obligor in the note in controversy, as there is no sufficient indication that either of the appellees participated in any fraudulent act or arrangement for overreaching or circumventing the appellant, or accepted the note with knowledge of any such fraud, the principle is well settled that the appellant, who trusted T. P. Mitchell with his name as his surety or co-obligor, must abide the consequences of his confidence in him rather than placing the loss on the innocent holders of the note.

And as the instructions and rulings of the circuit court were in substantial conformity with this view of the law, and the evidence is consistent with the finding of the jury, we perceive no ground for reversing the judgment, which is, therefore, *affirmed*.

Thompson, Durham & Jacobs, for appellant.

Vanwinkle & Fox, for appellees.

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O. D. McMANAMA v. M. LUCAS.

Appeals and Errors—Appeal from Quarterly Court—Limitation.

If the sixty days allowed by law in which to take an appeal has expired before the appeal has been taken, the appeal should be dismissed instead of rendering other judgment for the same amount.

APPEAL FROM GRANT CIRCUIT COURT.

October 12, 1871.

OPINION BY JUDGE HARDIN :

The record does not disclose the date of the judgment of the quarterly court, but if, as seems to have been ascertained by the circuit court, the sixty days allowed by law for taking the appeal had expired when the appeal was taken, it was proper to dismiss the appeal so as to remit the appellee to his right to enforce his judgment in the quarterly court, but not to render another judgment for the same claim.

Wherefore the judgment is reversed and the cause remanded with directions to dismiss the appeal at the costs of the appellant. The chief justice not sitting.

McManama, for appellant.

Drane, Simmons, for appellee.

THEODORE B. LANT v. LOUISVILLE, CIN. & LEX. RAILROAD CO.**Set-off and Counter-claim—Unliquidated Damages Cannot be Pleaded as a Set-off.**

Unliquidated damages growing out of an altogether different transaction cannot be pleaded as a set-off.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 16, 1871.

OPINION BY JUDGE PETERS :

It is alleged that the misrepresentations and fraud complained of were not made and perpetrated in the sale of the lot for which the note sued on was executed but in the sale of another lot

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made months before. We do not see well how unliquidated damages for fraud in an altogether different transaction, having no connection with the contract out of which this action grew, can be allowed as a set-off to the demand herein set up. We therefore conclude that the demurrer to the answers were properly sustained.

Wherefore the judgment is *affirmed*.

Harrison, for appellant.

Wright & Green, for appellee.

L. S. LANSDALE *v.* W. B. BEALL'S HEIRS.

Appeals and Errors—Judgment in Conformity to Opinion—Subsequent Appeal—No New Proof—Judgment Will be Affirmed.

There was no proof taken in this case after its return to the lower court, and as the judgment appealed from conforms to the opinion then rendered, the judgment must be affirmed.

APPEAL FROM BULLITT CIRCUIT COURT.

. September 26, 1871.

OPINION BY JUDGE PETERS:

This is the third time this case has made its appearance in this court. The second judgment appealed from was rendered the 20th of August, 1862, and was for \$600.82. That judgment was reversed by this court, and in the opinion delivered then, the amount due for the land was fixed at about one-half of the amount adjudged against appellants, and this, too, on the basis that appellants were chargeable with only a moiety of the residual 310 acres. It seems, therefore, that nothing was left open by that opinion, and as no proof has been taken since the return of the cause after that opinion was delivered and the judgment now appealed from conforms to the opinion of this court, the judgment must be affirmed.

Landsdale, Wintersmith & Field, for appellant.

Thompson, for appellees.

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J. D. LANDRUM v. L. FARMER.

**Compromise and Settlement—Mutual Accounts—Mistake in Bookkeeping
—Knowledge of Defendant.**

If appellee had not correctly kept his books, it was not the fault of appellant, but it was his fault when he came to settle with appellee that he did not there and then disclose the fact that more tobacco had been delivered to him than was charged on the books of appellee.

APPEAL FROM MARSHALL CIRCUIT COURT.

November 13, 1871.

OPINION BY JUDGE PETERS:

From the evidence it appears that in the adjustment of the matters between appellant and appellee it appears that the tobacco charged in paper marked "X" and made part of Mathis' deposition was not taken into the estimate, and Fletcher proves that the charges on said paper are correct, he having priced and kept an account of the same.

Another significant fact cannot be omitted in this investigation. Appellee insisted during the whole time that Walters and Mathis were engaged in settling the accounts between them, that all the tobacco purchased and paid for by him did not appear on the book, and would not agree to the terms proposed by them except upon condition that if he discovered, upon further investigation, there was a mistake, it should be corrected.

And afterwards appellant told Mathis, as he proves, that he knew when the settlement was made that the books did not show all the tobacco that was purchased by appellee and that more tobacco had been purchased and delivered to him in Paducah than he was made to account for. But it was not his fault that they had not kept their books correctly.

If appellee had not correctly kept his books it certainly was not the fault of appellant, from anything that appears in this record, but it was his fault when he came to a settlement with appellee, and he knew that more tobacco had been purchased and delivered to him in Paducah than was charged to him; that he did not then and there disclose the fact, and to the extent of his knowledge on the subject account for all the tobacco so

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received by him. His failure to disclose that knowledge would entitle appellee to a re-adjustment of their accounts, whether the right to do so had been expressly reserved or not.

As to the \$150 charged to appellant as having been collected of Cain and which was owing to appellee, he fails in his answer to deny that he collected it, but denies that he is indebted to him therefor, and says that he has paid and did allow appellee credit for the same, including it in the settlement.

This is an admission that he collected the money and claims that it was settled in the adjustment made by Waller and Mathis, which, as is shown by the evidence, was erroneous and should be corrected.

Perceiving no error, therefore, in the judgment, the same is *affirmed*.

Palmer, for appellant.

ELIJAH LITTON, ETC., v. MARY E. CARTY, ETC.

**Sheriff and Constable—Failure to Return Execution—Motion—Judgment—
No Defense that Whole of Execution Could Not Have Been Made.**

It is no defense, on a motion against a sheriff for failure to return an execution within thirty days, that the whole of the execution could not have been made. The restrictive provision of the statute as to executions against insolvent defendants does not apply.

APPEAL FROM WHITLEY CIRCUIT COURT.

October 28, 1871.

OPINION BY JUDGE HARDIN:

This appeal is prosecuted by the appellant, Litton, late sheriff of Whitley county, and the sureties in his official bond from a judgment rendered upon a motion against them for \$959.86, with interest from the 30th of March, 1867, and \$281.80 damages for the failure of the sheriff to return an execution which came to his hands against J. R. Evans and W. H. Duncan, for thirty days after the return day thereof, without reasonable excuse for such failure.

The execution was for \$667.87 with interest from the 11th of April, 1860, and \$11.50 costs, and was returnable on the third

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Monday in January, 1867, and appears to have been returned in March, 1867.

The defendant attempted to show a reasonable excuse for the failure to return the execution by proving that it was lost by a deputy sheriff, but although he proved the loss of his coat with the execution in a pocket of it, it appears that thirty days had then elapsed after the return day and the liability of the sheriff and his sureties had already accrued before the loss of the coat.

Nor could the judgment have been avoided on the ground that the whole of the execution could not be made. As it sufficiently appears that Evans had property out of which a part of it could have been made and the restrictive provision of the statute as to executions against insolvent defendants, not having property in the county out of which any part of an execution could be made, does not apply as was decided by this court in *Goodrum v. Root, etc.*, 2 Metcalf 427.

Nor is the responsibility of the sheriff and his deputies diminished in this case by the act of August 28, 1862, to amend article 18, of chapter 36, of the Revised Statutes (Myers' Supp. 213). That act being restricted in its application to cases in which all or a part of the debt is paid over and nothing in its terms or by any reasonable construction could apply in a case like this.

The foregoing opinion was heretofore delivered in this case with a mandatory order affirming the judgment, but on the petition of the appellants, a rehearing was granted. From a more careful examination of the record we find the judgment is erroneous in allowing interest on the \$959.36 adjudged, from the 30th day of March, 1867, instead of the 30th of November, 1867, as claimed in the notice. The judgment is now reversed and the cause remanded for a new trial and for further proceedings not inconsistent with this opinion.

Rodman, for appellant.

James, for appellee.

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NORTHERN BANK OF KENTUCKY *v.* JOHN S. SCOTT.**Banks and Banking—Unauthorized Payment of Check—Acquiescence—Estoppel.**

The appellant waived his right of action against the bank by taking up the check and assenting to the charge for the payment against him, as shown by his permitting his account with the bank, including the charge, to be balanced on his passbook without objection, and especially so as he acquiesced in the transaction for three years.

APPEAL OF KENTON CIRCUIT COURT.

October 12, 1871.

OPINION BY JUDGE HARDIN :

If it be true as contended for the appellee, that the bank was unauthorized to pay the check of the appellee without the genuine endorsement of Carlisle or his authority, and that the bank by paying it to Hamilton who endorsed it in Carlisle's name as by Carlisle Hamilton and Carlisle, incurred responsibility to the appellee, which he might have enforced. We are satisfied from the evidence that he waived his right to do so by taking up the check on the 3d of January, 1866, and assenting to the charge for the payment against him as shown by his permitting his account with the bank, including that charge, to be balanced on his passbook without objection, and especially so, as he seems to have acquiesced in the transaction for nearly three years after being informed by Carlisle that he did not authorize the endorsement.

Wherefore the judgment is reversed and the cause remanded for a new trial consistent with this opinion.

Johnson, Menzies & Furber, for appellant.

Pryor, for appellee.

JOHN McELWAIN *v.* W. J. WRIGHT.**Trust—Action Against Trustee to Subject Trust Property—Necessary Allegation and Prayer—Amendment.**

If the original petition did not authorize the direction in the judgment, that it should be levied of trust estate in the hands of the defendant, the amendment filed after the judgment was rendered could not cure the defect.

Opinion of the Court.

APPEAL FROM HENRY CIRCUIT COURT.

June 28, 1871.

OPINION BY JUDGE HARDIN :

If the original petition did not authorize the direction in the judgment that it should be levied of trust estate in the defendant's hands, the amendment filed after the judgment was rendered could not cure the defect; and as the petition contained no allegation nor prayer as to trust property, much less such a presentation of facts as were necessary to enable the court to know what judgment it might render as to such property without injustice to rights secured by the trust, the court erred in doing more than to render an ordinary personal judgment.

Wherefore the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Scott, for appellant.

Webb & Barbour, for appellee.

H. N. & J. W. MCGHEE v. L. B. MCGHEE, ETC.

Evidence—Receipt on Margin of Deed—Competency.

The receipt of Johnson and Jewell, written on the margin of the deed, was as to the parties to this suit only a written statement of third parties, not verified in any form, necessary to render it competent as testimony.

APPEAL FROM HICKMAN CIRCUIT COURT.

September 27, 1871.

OPINION BY JUDGE HARDIN :

The receipt of Johnson and Jewell, written on the margin of the deed from L. W. McGhee to appellants, was, as between the parties to this suit, only a written statement of third parties, not verified in any form, necessary to render it competent as testimony in this case, and it was therefore properly rejected by the court.

Without elaboration or analysis of the facts on which the correctness of the judgment declaring said deed fraudulent and

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invalid must depend, it is deemed sufficient to say that the preponderance of the evidence seems to us to sustain the conclusion of the circuit court.

The judgment is therefore affirmed. Judge Lindsay not sitting.

Crossland, for appellants.

Lindsay, for appellees.

MARTHA H. NOE v. GEORGE B. TURNER.

Trial—Order Dismissing—Litigation Continued—Acquiescence by Both Parties.

Notwithstanding the order dismissing the case, or however it may have been obtained, the parties seemed to have acquiesced afterwards in the pendency of their litigation, the order was treated as waived.

APPEAL FROM HARDIN CIRCUIT COURT.

November 10, 1871.

OPINION BY JUDGE HARDIN :

Notwithstanding the order of dismissal, and however it may have been obtained, the parties seemed to have acquiesced afterwards in the pendency of their litigation and we think the order may have been treated as waived, if not properly set aside by the court.

From the character of the issues and the depositions copied in the record, it is, at best, probable, that the appellant might have defeated the claim as illegal if he had not submitted the case to arbitration.

But no sufficient ground was disclosed for setting the verdict aside and it is not subject to revision now. If it was, there is no bill of exceptions by which this court could know what oral testimony may have been heard and considered by the referee, Unthank, and we cannot therefore say that the award was not right. Therefore the judgment is *affirmed*.

James, for appellant.

Rodman, Farmer, for appellee.

Opinion of the Court.

W. G. MORRIS *v.* LEVI TYLER'S EXRS.**Frauds, Statute of—Promise to Answer for Debt of Another.**

Appellant undertook to satisfy the debt he owed Hill by paying the amount to Speed, Hill's creditor, which was a promise founded on sufficient consideration, and need not be in writing to make it obligatory.

APPEAL FROM KENTON CIRCUIT COURT.

September 11, 1871.

OPINION BY JUDGE PETERS:

According to the allegations of the petition appellee, Speed, as executor of Tyler, leased the premises to Hill at \$1,000 per annum, payable quarterly. Subsequently Hill sub-let them to appellant at the same rent he was to pay, with Speed's consent and, although, appellant, as is alleged, refused to accept the order drawn on him by Hill for the quarter's rent falling due the 1st of October, 1869, it is alleged that he had occupied the premises for more than three months prior to the date aforesaid, was justly indebted therefor in the sum named, and that he had after undertaken and promised to pay Speed the debt aforesaid, but had hitherto wholly neglected to pay the same or any part thereof.

These allegations are not controverted, and taken as true, import that appellants being indebted to Hill in the sum of \$250 for a quarter's rent, in consideration thereof, undertook and promised to pay Speed, the landlord, said sum in satisfaction of Hill's indebtedness to Speed.

It was an undertaking on the part of appellant to satisfy the debt he owed Hill by paying the amount to Speed, Hill's creditor, a promise founded on a sufficient consideration and need not be in writing to make it obligatory.

Let the judgment, therefore, be affirmed.

Stevenson & Myers, for appellant.

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D. P. MALONEY *v.* JOHN P. BALEE, ETC.

Estoppel—Equitable Principles—Innocent Parties.

It is not consistent with the principles of equity that appellant, after having permitted the legal title to remain in Balee for ten years without any effort to divest him of the title, should be permitted to come in and defeat the claims of Balee's creditors and other innocent parties who trusted him on the faith that he was the owner of the land.

APPEAL FROM HENDERSON CIRCUIT COURT.

June 12, 1871.

OPINION BY JUDGE PETERS:

It does not seem consistent with the principles of equity that appellant after having permitted the legal title to remain in Balee for ten years and more without any effort to redeem the land, or to divest Balee of the title, should be permitted to come in and defeat the claims of Balee's creditors and other innocent parties who trusted him on the faith that he was the owner of the land.

What might be the rights of Elnora B. Maloney we make no suggestions as she is not an appellant.

Wherefore the judgment is affirmed.

Rodman and Eaves, for appellant.

Vance, Turner & Trafton, for appellee.

WILLIAM NEWTON *v.* LUCINDA NEWTON.

Depositions—Postponement of Cross-Examination at the Instance of Adverse Party.

The witness was summoned by the commissioner to testify in the case, and from the affidavit filed, it appears that the counsel for the appellant had ample time to cross-examine, and the cross-examination was postponed at his instance. The appellee was not compelled to produce the witness in order that he might be re-examined.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 9, 1871.

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OPINION BY JUDGE PRYOR:

The judgment in this case is made to conform to the commissioner's report, and this is substantially correct, unless the testimony of the witness, Davidson, is excluded from the case. This witness was summoned by the commissioner to testify in the case and from the affidavit filed it appears that the counsel for the appellant had ample time to cross-examine. The cross-examination was postponed at the instance of the appellant and the appellee was not compelled to produce the witness in order that he might be re-examined. The witness had left the state and moved to Virginia at the time the cause was submitted and there was not even an affidavit filed by the appellant showing what he expected to prove by him on the cross-examination, nor was there any objection made to the submission of the cause for judgment. If the witness, however, had been in the county and objection made to the submission, there would still be no cause for a continuance of the case. The judgment is affirmed.

Ray & Hardin, for appellant.

Owen, for appellee.

MARC MUNDAY v. JOHN W. LEATHERS.

Attorney and Client—False Imprisonment—Contract for Services to Secure Release.

The arrest and imprisonment being unlawful, the contract to pay appellant for services to be rendered to effect the appellee's release was not unlawful or against the policy of the law, nor was it without consideration.

APPEAL FROM KENTON CIRCUIT COURT.

June 21, 1871.

OPINION BY JUDGE HARDIN:

The appellee alleged in his answer in substance and effect, that his arrest and imprisonment were without lawful authority; and the evidence conduces to sustain the allegation; this being

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so, the contract to pay the appellant for services to be rendered to affect the appellee's release or escape from apprehended danger, was not necessarily unlawful or against the policy of the law as was in effect decided in the recent case of *Thompson v. Wharton*; and the judgment can not be sustained on the ground that the consideration of the draft sued on was missing, the answer not alleging either fraud or duress on the part of the appellant, practiced by himself or others in collusion with him, as an inducement to his employment. Nor can we affirm the judgment on the only other ground of defense, presented by the answer, viz.: that the draft was given for no consideration, as it appears that said service was rendered by which the appellant was temporarily, at least, released from prison and restored to his liberty, of which it seems he was unlawfully deprived by the exercise of arbitrary power. Wherefore the judgment is reversed and the cause remanded for a new trial and for other proceedings not inconsistent with this opinion.

Rankin, Hawkins, for appellant.

Carlisle, for appellee.

ISABELLA MCKINNEY v. RUBEN POWELL.**Estoppel—By Record—Allegation in Former Pleadings.**

It is evident that appellee knew that the appellant was a weak-minded and ignorant woman from the fact that in his answer to the original petition of Atkins he adopted the answer filed by her containing the statement, "that she is wholly unqualified by nature, by education, and as a woman, to examine into the indebtedness of her husband."

APPEAL FROM SCOTT CIRCUIT COURT.

November 4, 1871.

OPINION BY JUDGE HARDIN:

Although, on the question, whether the appellant had a sufficient mental capacity to take care of property or prudently transact any ordinary business, there is some contrariety of evidence. The evidence is abundant and convincing that she was a weak minded and ignorant woman; particularly liable, situated as she was

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after her husband's death, to be over-reached and imposed upon in any disposition she might attempt to make of her interest in his estate. She was not qualified to readily understand the nature or value of her legal rights, either as the devisee or widow of McKinney, and it is evident that the appellee knew this, for in his answer to the original petition of Atkins, he adopted the answer filed by her containing the statement "that she is wholly unqualified by nature, by education, and as a woman to examine into the indebtedness of her husband." The statements of that answer as well as those of the answer of the appellee import a belief that the mortgage claim of Atkins was unjust and invalid; but while the terms of the contract between the appellee and appellant indicates that he acted wisely on that belief, they conduce to an opposite conclusion as to her, for it is almost incredible that she would have either renounced the provisions of the will or sold her interest in the estate for \$30.00 if she really anticipated the defeat of Atkins' claim and rightly comprehended the value of the rights of which she thus attempted to deprive herself.

The solicitude and haste manifested by the appellee to get the appellant to sell her interest to him, as well as the persuasive arguments he made to her to affect that object, though against the wishes of her father and mother, strongly conduce to the conclusion that he sought to take an unconscientious advantage of her; and as the renunciation of the will occurred after the execution of the deed and on the day the deed was made, when the appellee was apparently most interested in having it made, we must regard it as part of the same transaction and superinduced by the appellee.

We are of the opinion that neither the renunciation of the will nor the sale and conveyance to the appellee ought to stand; but the court should have set them both aside and proceeded to adjust the relative rights of the parties on equitable principles with reference to the \$30.00 paid and improvements, if any were made, and the value of the garden appropriated by the appellee and the fair and reasonable rent of the property and waste, if any was committed.

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Wherefore the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Stevenson, Shepard, for appellant.

Robinson, for appellee.

LOUISVILLE, CITY OF, *v.* E. W. C. HUMPHREY, ETC.

Municipal Corporation—Street Improvement—City Not Liable to Contractor When Made on Private Property.

The city charter forbids that the city should be taxed with the cost of work of the character of that done by the contractor, when put upon private property, or upon a street or alley for improving which the adjacent property could have been made liable. If, therefore, there is no public alley where the work was done, the city is not liable because the charter forbids it. If, on the other hand, there is an alley, the city is not liable, but the owners of the adjacent land are.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 5, 1871.

OPINION BY JUDGE LINDSAY:

Pursuant to an ordinance regularly passed by the general council of the city of Louisville, the mayor contracted with Salvage and Terry to grade and pave a strip of ground extending from Floyd street to Waterberry street and designated in the ordinance and contract as an alley twenty feet wide.

The work having been completed and accepted and the costs thereof apportioned according to law among the owners of the lots binding on the supposed alley, this suit was brought thereon by a holder by assignment from the contractors of a part of the apportionment warrants to compel payment thereof. The city was made a party to the suit and judgment was prayed for against it in the event that no recovery could be had against the adjacent property. The lot owners answered and resisted a recovery upon the sole ground that there was no public alley at the place where the work was done, but the same was the private property of E. W. C. Humphrey. The cause was prepared upon that single question and on final hearing the court adjudged that

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the ground covered by the work done under the contract was the private property of said Humphrey, and dismissed the petition as to all of the defendants except the city. Thereupon the plaintiff amended his petition and alleged that the ground upon which the work was done was private property, and that the city council had no authority to order it to be improved, and prayed for judgment against the city for the price of the work. To that pleading the city made no answer, and the court rendered judgment for the amount claimed, and to reverse that judgment the city prosecutes this appeal, and also appeals from the judgment dismissing the petition as to the lot owners.

As to the last named judgment it is only necessary to say that the city is no party to it and can not appeal from it, and that much of the appeal is therefore dismissed.

Counsel for the city argues first, that the ground improved is a public alley, which counsel for the property owners maintain the converse. It is also contended, for the city, that whether the ground is a public alley or not, a judgment against the city was unauthorized. If the latter position is well taken we need not consider the first. The argument is, that if the improvement was made upon ground that had become a public alley, the lot owners could have been rendered liable to pay its costs and if the lot owners are, or could have been made liable, the city is not liable; and if the ground has not become an established alley the city council had no power to contract for its improvement and the ordinance and contract are ultra vires and therefore void. The improvement of streets and alleys is within the general scope of the powers and authority of the city government, and we are not prepared to decide that the simple fact that the ground where the improvement was made was private property would exempt the city from liability to a contractor who had completed his work according to ordinance and contract if it were not for the peculiar provision of that part of the charter of the city relating to payments for the improvements for public highways.

Section 12 provides that the streets, alleys, etc., in the city shall be under the management and control of the city government, and that the city shall have power to improve them at the exclusive cost of the owners of adjacent property, and for the

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apportionment of the costs among such owners, and then provides that in no event shall the city be made liable for such improvements without having the right to enforce it against the property receiving the benefit thereof. In view of this provision we held in *Craycraft v. Selvage*, 10 Bush 696, that when, by taking the proper steps the general council could have made the improvements at the costs of the property holders, the city could not be made liable to the contractor although in consequence of the neglect or omission of the council to adopt the necessary measures the property-holders escaped liability. In *Caldwell v. Rupert*, 10 Bush 179, and the *City of Louisville v. Nevins* (10 B. 549), we held that inasmuch as the general council had power to improve all the streets and alleys in the city when the nature or ownership of property is such that no steps which could be taken would render it liable for the costs of the improvements, the city would be liable. But in this case, if the work done was upon private property, the general council neither had power to have it done nor to make its costs a charge upon adjacent property, and the principles of the last two cases cited does not apply to this.

The language of the charter forbid a judgment against the city because, although there was no authority to make the costs a charge on the property, there is a prohibition to make it a charge against the city. In *Nevins'* case there was authority to make the improvement because it was made on an established street, which the charter in express terms gives the council power to improve and that grant of power would have been defeated unless the work could be paid for by the city, and it was therefore necessary to consider the two provisions in connection in order to give full effect to the legislative will, and to effectuate the design of the charter. In this case, however, there is but a single clause of the charter bearing upon the subject, and that forbids that the city should be taxed with the cost of work of the character of that done by *Selvage* and *Terry* when put upon private property, or upon a street or alley for improving which the adjacent property could have been made liable. If, therefore, there is no public alley where the work was done, the city is not liable because the charter forbids it; if, on the other hand, there is an alley the city is not liable but the owners

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of adjacent land are, it being tacitly conceded that all the steps were taken which are necessary to a valid ordinance and contract.

Wherefore the judgment is reversed and the cause is remanded with directions to dismiss the petition as to the city. The city is entitled to costs against Vollmer; the other appellees are entitled to costs against the city.

Bennett, Humphrey, Fox & Twyman, for appellees.

JAMES P. LAND *v.* C. G. LAND, ETC.

Partnership—Silent Partner—Right and Liabilities as to Third Parties.

A court of equity will not protect or enforce the rights of a partner as against those who have even acquired the partnership effects in good faith, where for the period of two years and longer he stands quietly by and permits innocent parties to deal with his partner as if he was the sole owner of the property, and the court will not, after this long acquiescence on his part, hunt up partnership monies invested in real estate to which another has the legal title.

APPEAL FROM HARRISON CIRCUIT COURT.

October 4, 1871.

OPINION BY JUDGE PRYOR:

That partners have a lien upon partnership property to secure the payment of partnership debts is unquestioned, and that one partner has no right to use the partnership asset in the payment of an individual debt to the prejudice of the other partner, is equally as well settled, but the well settled principles in reference to partnerships cannot be made applicable to the facts as presented by this record. The appellee, C. G. Land, was engaged in selling goods in the town of Cynthiana in the year 1865, and during that year formed a partnership with the appellant by which the appellant became entitled to one-fourth of the partnership effects and profits and the appellee, C. G. Land, to the other three-fourths. Shortly before the partnership was created the appellee had commenced the erection of a storehouse on ground purchased of one Box. On the 27th day of July, 1866,

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Box and wife conveyed by deed this lot of ground upon which the business house was being built to the wife of the appellee, C. G. Land. During the period this house was being built, he borrowed of McGibbon and Mrs. Sweeney about \$2,600.00, and in conjunction with his wife executed a mortgage on the lot, including the improvements, to secure its payment. The money thus borrowed was placed to the appellee, C. G. Land's credit, on the firm books. The hands and those employed in the erection of the building were paid some in goods, and others in money out of the partnership assets, the money borrowed having constituted a part of these assets.

In 1868 the appellee, McKee, purchased of the appellee, C. G. Land, this house and lot, and in payment therefor discharged the debts for which the mortgage was given to secure and took in his own note, owing him by C. G. Land, for about \$2,000.00. The appellee, C. G. Land, sold the entire stock of goods to one Cox for \$4,246.00, and the principal part of this sum was applied to the payment of the partnership debts. The appellant now brings this suit in which he alleges that he has paid off the partnership debts, and that the firm is indebted to him several hundred dollars. He insists that the house and lot of ground sold to McKee is partnership property, for the reason that it was built and purchased with the partnership funds, and that the house and lot is liable to the extent of the partnership assets used in its purchase, and the erection of the building, and that McKee was cognizant that it was bought and built with partnership funds when he purchased the property. He also seeks to recover from the appellees, Curry and wife, a sum of money paid them, as he alleges, out of the partnership funds in discharge of the individual indebtedness of the appellee, C. G. Land.

It seems from the proof that the appellant lived in the county of Lincoln from the formation of the partnership in 1865 until its termination in 1868; that he was represented in the store by a clerk, he having placed him there as a salesman. The appellee, C. G. Land, had the entire and unlimited control of all the partnership interests and from 1865 to 1868 used the partnership funds for any and all purposes, both in the discharge of his individual as well as the partnership debts.

The deed to the house and lot was made in 1866 to the wife and recorded in the Harrison clerk's office. The expenditures

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made for the purpose of the building were entered in the books of the firm, but so far as the proof shows no one of the parties defendants to the action except the appellee, C. G. Land, and wife ever knew who constituted the firm, and no knowledge of the misapplication of the assets was ever brought home to any one of them. McKee had the right to believe that the house and lot belonged to the wife. She had a deed for the property, and that deed had been of record in the Harrison county clerk's office for nearly two years. It is true that the firm's name was C. G. Land & Co., but what that company was, seemed to have been unknown in Cynthiana until the insolvency of C. G. Land occurred.

The appellant was grossly neglectful of his business, or he acquiesced in the conduct of his partner so far as it effected the business of the partnership.

We are inclined to believe that the appellant must have known of the manner in which C. G. Land was conducting the business of the firm. The house was built after the partnership was formed; the deed made to Mrs. Land and monies appropriated all the time by the business partner to the payment of his own debts as well as in the improvements of the property. Entries were made in the books of these expenditures, with the knowledge on the part of the clerk at least, of the wrongful appropriation of the monies.

This mode of conducting the business continued as long as the partnership lasted, and was evidence to those who transacted business with the active partner of his right to use the partnership funds as he saw proper, or, in other words, he was regarded by them as the sole owner of the establishment.

The appellant at no time ever asserted any claim upon the partnership property in any way, and never, by word or action, gave any of those dealing and trading with C. G. Land notice that the appellant had any interest whatever in the store, until the institution of this suit.

A court of equity will not protect or enforce the rights of the appellant as against those who have even acquired the partnership effects in good faith, when, for the period of two years and longer, he stands quietly by and permits innocent parties to deal with his partner as if he was the sole owner of the property.

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He must not expect a court of equity after this long acquiescence on his part and the gross neglect of his own business, to hunt up partnership monies invested in the improvements of real estate to which others have the legal title, and out of this improvement to reimburse him as against innocent purchasers. The claim of Curry and wife was for money loaned and used for the partnership purposes, and whether it was or not the appellant has no right to it as against them for the reasons already stated. We perceive no error in the judgment prejudicial to the appellant the same is therefore affirmed.

J. Q. Ward, for appellant.

McClintock, for appellees.

JOHN MOSS *v.* JOSEPH M. MOSS.

Process—Lost Summons—How Proven—Entry on Docket.

The entry on the common law docket is competent evidence of the service of the summons on the defendant.

Replevin Bond—Proof of Existence.

The recitals in an execution that it was issued on a replevin bond is not evidence of the existence of such bond, which bond is a quasi judgment.

APPEAL FROM GARRARD CIRCUIT COURT.

December 17, 1867.

OPINION BY JUDGE PETERS:

Although the clerk states in the transcript of the record of Tilford against Moss, etc., that the summons has been misplaced and is not on file, on the trial of the action no evidence was offered to show that the summons has been issued and executed on the defendants and had, in fact, been lost, such evidence would have been competent after laying the proper foundation for its admission. Nor was there any evidence whatever that the judgment had been replevied; the bond was not produced and its absence not accounted for; the recital in the execution is not evidence of the existence of such bond.

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It has so often been held by this court that sales of real estate made by sheriffs where the judgments to uphold the executions were not produced that it is a useless waste of time to refer to authorities.

Here the replevin bond, if it had been offered on the trial, would have been sufficient to sustain the execution and sale, but it was not produced, and no evidence offered that such bond ever existed. Whether or not the evidence accompanying the brief of appellee's counsel would have supplied the failure in the evidence we cannot now decide, as that evidence was not offered on the trial, and the question is not before the court. The entry on the common law docket would be admissible to show whether or not the summons had been served. Sec. 383, Civ. Code.

As, therefore, there is no replevin bond which is a quasi judgment offered in evidence to uphold the execution in favor of Tilford, and without such evidence the sheriff exceeded his authority in selling more land than was required to satisfy the executions in his hands sustained by judgments, the ruling of the court below was erroneous. Wherefore the judgment is reversed and the cause remanded with directions to award a new trial and for further proceedings not inconsistent with this opinion.

Bradley, for appellee.

Dunlap, for appellant.

THE JEFFERSON SOUTHERN POND & DRAINING COMPANY v. E. J.
FRISBEE ET AL.

**Taxation—Private Corporation Authorized by Law to Make Assessment—
Superior Lien to Prior Incumbrance.**

The second section of the act gave to appellant a lien on the land assessed for the payment of the tax. This lien is not made to depend upon the manner in which the land may be held, and cannot be defeated because of the fact that the owner had incumbered his title by mortgage or otherwise prior to the assessment of the tax. The holder of the legal title and the equitable owner of the land are alike bound to submit to the payment of any tax constitutionally imposed, whether it be for the use and benefit of the commonwealth, or a public, or a mere private corporation.

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APPEAL FROM LOUISVILLE CHANCERY COURT.

June 22, 1871.

OPINION BY JUDGE LINDSAY:

No objection is taken to the claim of appellant on account of any doubts as to the constitutionality of the tax assessed (against the lands decreed to be sold) under the acts of the general assembly authorizing the assessment thereof by the Jefferson Southern Pond & Draining Company, hence the only question presented for adjudication is as to the priority of the liens held by the various creditors.

The second section of the act of March 9, 1868 (2 vol., Session Acts 1867-68), gives to the said Pond Draining Company "a lien on the land assessed for the payment of the tax."

This lien is not made to depend upon the manner in which the land may be held, and cannot be defeated because of the fact that the owner had encumbered his title by mortgage or otherwise prior to the assessment of the tax. The holder of the legal title and the equitable owner of the land are alike bound to submit to the payment of any tax, constitutionally imposed, whether it be for the use and benefit of the commonwealth or of a public or a mere private corporation.

The fact that the tax is assessed and collected through the agency of a corporation does not make it any the less the act of the state government than if it had been directly imposed by the legislature and its collection enforced in the same manner with the general revenues of the commonwealth.

The assessment, if constitutional, is a debt due to the state, to be collected and expended by the Pond Draining Company for the benefit of the local public affected thereby, consequently the company's lien on the lands taxed is superior to all others, whether prior or subsequently in date.

In so far as the judgment postpones the appellant to other creditors it is erroneous, and to that extent it is reversed.

The cause is remanded for the correction of said error and for other proper proceedings.

Coke & Arbogast, for appellant.

Moore, for appellee.

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RODY HAGAN v. ENGLISH & MURPHY.

Mechanics' Liens—Labor on Earth of Railroad.

The mechanics' lien law of February 17, 1858, does not apply to work and labor performed in the erection of the earthwork of a railroad track. The mere earthwork of a railroad cannot be regarded as a structure in the sense that the term is used in the act.

Appearance—Prosecution of Appeal.

Although the court reversed the first judgment in the case of *Murphy v. Higden* because no summons had been issued and served on the pleadings of the Shanks, yet the prosecution of the appeal operated as the entering of the appearance of Murphy and Higden and no service of summons was necessary after the return of the case.

Trust—Money Expended by Trustee—Preferred Lien.

While the writing was not a deed of trust or binding on the creditors, yet so far as the Shanks executed the power therein conferred upon them, they are entitled to protection, and as they advanced their private means to carry on the work, they should be reimbursed in full.

Trust—Compensation of Trustee.

As to the claim of the trustees for compensation for services rendered, the paper under which they acted was notice to them that such a claim would be postponed until the preferred creditors were paid in full.

APPEAL FROM GARRARD CIRCUIT COURT.

September 25, 1871.

OPINION BY JUDGE LINDSAY:

The mechanic's lien law of February 17, 1858, Myers' Supplement 300, does not, in our opinion, apply to work and labor performed in the erection of the earthwork of a railroad track. None of the claims presented by the appellant, Hagan, seem to be for work or labor done, either on bridges or culverts, or for any kind of work done by carpenters, joiners, brick masons, stone masons, plasterers, *termers*, painters, brick makers, nor by any one else in constructing or repairing any building or other structure. The mere earthwork of a railroad cannot be regarded as a structure in the sense that term is used in said act. The paper executed by English & Murphy is not, technically speaking, a deed of trust, but it operated as a power of attorney to

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J. H. & S. H. Shanks. It was in no sense fraudulent as to any creditor, and seems to have been executed upon sufficient consideration.

While it was not binding upon creditors who were not parties to it, yet in so far as the Shanks executed the powers therein conferred upon them they are entitled to be protected, and if it was to enable English & Murphy to continue work upon their contract they advanced their own private means, they should be reimbursed in full out of the money paid over by the Louisville & Nashville Railroad Company after the institution of these actions.

As to their claims to compensation for services rendered, the paper under which they acted was of itself notice to them that such a claim would be postponed till the preferred debts were paid in full, it was, therefore, not error to so postpone such claims. Although this court reversed the first judgment in the case of *Murphy v. Higden* because no summons had been issued and served on the pleadings of the Shanks, yet the prosecution of the appeal operated as the entering of the appearance of Murphy and Higden, and no service of summons after the return of the cause was necessary. The deposition of Hill was taken subsequent to the filing of the mandate of this court, and was, therefore, properly read on the final trial of this cause.

Murphy, under whom Higden holds his claim, and whose assignee he is, was a party to and accepted the terms of the power of attorney executed to the Shanks by English and Murphy. This paper postponed the payment of their judgment until after certain preferred claims had been satisfied. This subsequent attempt to secure a preference, by a new suit and an order of injunction, was an attempt to violate their contract with the other creditors. The court properly disregarded this pretended injunction lien.

We are of opinion that the judgment in this cause secures substantial justice to all the parties complaining. That a protraction of the litigation will have the effect of exhausting the fund in the hands of the court, and operate injuriously to all parties interested. Wherefore the judgment is affirmed on the original and also on the cross-appeal.

McKee, for appellant.

Bradley, Owsley & Burdett, for appellees.

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JOHN HAYDEN'S ADMR., ETC., v. HENRY BELL & SON ET AL.

Executors and Administrators—Account of Sales—Appraisement—May be Adopted as Accurate.

An administrator should keep accurate accounts of all sales of the personal property of the estate, whether made publicly or privately. If he fails to do so his liability on account of such property can only be ascertained by adopting the appraisement as correctly setting out its value.

APPEAL FROM WHITLEY CIRCUIT COURT.

December 7, 1870.

OPINION BY JUDGE LINDSAY:

The exceptions to the master's report were properly overruled.

The administrator should have kept an accurate account of all sales of the personal property of the estate of his intestate, whether made publicly or privately. He failed to do so, hence his liability on account of such property could only be ascertained even proximately by adopting the appraisement as correctly setting out its value, and holding him responsible for its conversion.

He was charged with no interest upon the notes and accounts for the two years within which he was allowed to settle his accounts, and not even then for such interest as he may have collected. He has no reason to complain at being required to account for interest after the expiration of the time within which he should have settled. The whole amount of the judgment is \$770.46. The amount in the administrators hands, according to the master's report, was \$509.06. To this should be added the amount he claims to have paid the widow of the intestate, \$252.50 with interest on the same, \$129.24; in all, \$381.79, and for which he was erroneously credited. This makes his total liability \$890.85 or \$120.59 more than he is required to account for.

It is true appellee did not except to the credit on the payment to the widow, but this court will not reverse for error of the court below, when it appears from the whole case that the substantial rights of the party appealing has not been injuriously affected by the judgment complained of.

Judgment affirmed.

James, for appellant.

Kinhead & Buckner, for appellee.

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JOHN HART v. MATHEW SMITHSON.

**Compromise and Settlement—Execution of Compromise—Circumstances
—As to Binding Effect—Question for Jury.**

The question as to whether or not the writing purporting to compromise the action was executed under such circumstances as to render it of no binding force was properly submitted to the jury.

Malicious Prosecution—Probable Cause—Instruction Defining.

Probable cause, being a question of law as well as of fact, should be defined by the court in its instructions to the jury.

APPEAL FROM FAYETTE CIRCUIT COURT.

December 15, 1870.

OPINION BY JUDGE LINDSAY:

The question as to whether or not the writing purporting to compromise this action was executed under such circumstances as to render it of no binding force or effect upon Smithson, was properly submitted to the jury, hence the court did not err in refusing to dismiss the action upon the filing of this paper.

The petition charged and the answer admitted every fact that could have been proven by the records of the examining court if the same had been before the jury. The court did not err to the prejudice of appellant in permitting the magistrate who held the examining court to speak of facts admitted to be true by the appellant, and whilst if denied could only have been proved by record evidence. The bill of exceptions fails to show which of the instructions asked for by the appellant were given or refused.

We must, therefore, presume that the court gave all that correctly embodied the law applicable to the case.

The 2d, 3d and 4th instructions given at the instance of appellee, qualified as they are by instructions No. 5 and 6 asked for by appellant and which as before stated, we must presume were given, are unexceptionable. "Probable Cause," being a question of law as well as of fact, ought to have been defined by the court, but as neither party asked an instruction upon this point and both parties used the terms in instructions asked for by them and given at their instance, we do not regard the failure

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of the court to grant such definition of its own motion such an error as will warrant a reversal by this court.

Perceiving no available error in the record the judgment must be affirmed.

The chief justice does not concur in the affirmance of the judgment, but would reverse it, especially for the admitted error in the instruction for the appellee referring to the jury the decision of the law as well as of the "facts of probable cause," which, in his opinion, was neither cured nor waived by the appellant's negative instruction without defining probable cause.

Huston & Mulligan, for appellant.

Breckenridge, Buckner, for appellee.

J. S. GALBAUGH v. THOS. WOODS AND CITY OF COVINGTON.

Municipal Corporation—Street Improvement—Petition to City Council—Estoppel.

A petition signed by a majority of the owners of the front feet requested the city to improve a street. The appellant who was one of the signers of the petition stood by and saw others expend their money on the improvement and made no objection thereto until he was called upon to pay his proportional part for the work.

Held, that by his acquiescence in the improvement he is estopped to deny his liability.

APPEAL FROM KENTON CIRCUIT COURT.

January 26, 1872.

It is alleged in the petition that at a meeting of the council of the city of Covington on the 6th of March, 1868, a petition of the property owners for the improvement of Fifteenth street between Scott and Madison streets was presented to the council, a copy of which is made part of the petition in which the petitioners state that they are the owners of lots and parts of lots fronting and abutting on Fifteenth street between Scott and Madison, to order said street between Scott and Madison to be graded, paved, curbed and macadamized at the expense of the owners of lots fronting on said improvement. This petition is

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signed, with others, by J. S. Galbaugh, professing to own 90 feet front to be improved. On the 2d of April, 1868, an ordinance was passed by the city council for the improvement as prayed for. The work was let to appellee, the lowest bidder, completed according to the ordinance and contract and an estimate was made by the city engineer of the amount due from each owner of lots for the improvement fronting their lots and an order to pay for the same, all of which facts are alleged and the work received, and appellant, failing to pay the amount assessed against him, this suit was brought to enforce payment.

In his answer appellant denies that the owners of a majority of front feet on both sides of Fifteenth street between Madison and Scott streets, ever, at any time, petitioned the city council to grade, pave, curb and macadamize said street—and then adds that the name of Mrs. Delaney is attached to the petition which was presented to the council as the owner of 45 feet front on said Fifteenth street; that Mrs. Delaney was not and is not the owner of any real estate whatever on said street, and without estimating the 45 feet represented by her, the owners of 350 feet front only were represented. To this answer a demurrer seems to have been sustained, but we deemed it unimportant whether the answer is in or out of the case. The strong presumption is from the identity of the name of appellant and that of J. S. Galbaugh signed to said petition to the city council and the corresponding number of front feet represented in the petition and those fronting the improvement that he did himself sign said petition and would, in that event, be estopped to deny any fact therein stated. It is true that the fact is not directly alleged, but the petition is exhibited and appellant must have seen it, and it is not probable that he would have failed to have negatived the presumption arising from the facts thus shown, if he could have truthfully done so. Besides, the parties who signed the petition appear to have been in possession; that fact is admitted, that they are the owners of a majority of feet fronting the improvement and is not controverted by any of the parties until after the work is done, of which they must have had notice; and having stood by and seen others expend money and labor to improve their property without objection or notification that they were unwilling to pay for it, or that less than a majority of the owners of front

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feet had petitioned, it is too late after the work is done to make such objection, or at least it cannot avail.

Wherefore the judgment is affirmed.

Carlisle, for appellant.

Fisks, for appellees.

JAS. W. GRAHAM v. S. J. M. MAJORS & TOBIN.

Contracts—Executory—Dissolution—Defect of Title—Incumbrance.

A chancellor will never dissolve even an executory contract at the instance of a complainant seeking a dissolution on the ground of a defect in or incumbrance on the title, if the incumbrance be removed and the title rendered perfect before the hearing, especially if there be no fraud on the part of the vendor by which injury accrues to the vendee.

Judgment—Rescission—Finality of Determination.

A judgment refusing to cancel a deed or to rescind a contract of purchase is a final determination of the question and may be appealed from although the judgment directs a sale of the property.

APPEAL FROM FRANKLIN CIRCUIT COURT.

January 9, 1871.

OPINION BY JUDGE LINDSAY:

Majors, being the owner of an undivided interest of two-thirds in a distillery and fixtures in Franklin county near the city of Frankfort, sold and conveyed one-half of his said interest to the appellant, Graham. A contract of partnership entered into between Graham and Majors & Tobin (who owned or controlled the remaining one-third of the property) by which it was agreed upon terms therein set out that they would engage in the manufacture and sale of spirituous liquors as well as in purchasing, feeding and selling stock.

Graham brought this suit alleging that the firm had made a considerable outlay of money for labor and material in repairing and renovating the distillery, and had also purchased grain and stock preparatory to commencing business, but he charged that "notwithstanding all this outlay and expenditure and preparation, said Majors & Tobin had shown no disposition to go on as

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the terms of the partnership require, but on the contrary, refused to do so."

He also stated that no license had been procured from the federal government, and that he "had been informed and believed and therefore charged that Majors was owing to N. Craig a balance on the property for which a lien was held," and that in consequence of said lien "no license could issue," and that this fact was concealed from him by Majors.

He prays for a rescission of the contract of sale by Majors to him for a settlement of the partnership and for judgment against Majors for \$4,000 on account of damages he claims to have sustained by reasons of Majors' failure to pay off and satisfy Craig's lien, and for other violations of the contract of partnership.

From this petition and from the answers of Majors and Tobin and the exhibits and evidence in the case, it appears that for reasons which they deemed satisfactory, Majors and Tobin did refuse to go on with the partnership business and that the contemplated adventure was therefore necessarily abandoned. Further, that Craig did hold a lien upon the property and that license could not have been procured so long as that lien existed, and that it was not removed by Majors until after the institution of this action and within a very short time before the rendition of the judgment appealed from.

The court below refused to cancel the deed from Majors to Graham or to rescind the contract of sale but ordered a sale of the partnership property, and referred all questions of accounts growing out of the partnership to a commissioner.

To the extent that this judgment refuses to rescind the contract of sale by Majors to Graham and directs a sale of the partnership property, it is final and can be revised by this court.

A chancellor will never dissolve even an executory contract at the instance of a complainant seeking a dissolution on the ground of a defect in or incumbrance on the title if the incumbrance be removed and the title rendered perfect before the hearing, especially if there be no fraud on the part of the vendor by which injury accrues to the vendee. *Daniel & Breck v. Smyth*, 5th B. Monroe 347.

In this case the contract was executed and it is not proven that Majors made any fraudulent representations to nor that he

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fraudulently concealed from Graham anything pertaining to the title of the property conveyed.

Generally speaking, Graham could have had no relief except upon the warranty of Majors unless upon the allegation and proof of insolvency.

In this particular case, if he had been prevented from using the property for the purposes for which it was brought, by reason of the failure of Majors to remove the lien in favor of Craig, the chancellor might have given him the relief sought, but he charges in his petition, and Majors and Tobin both admit that the business contemplated by the partnership was abandoned by them for reasons which they insist were good and sufficient.

It seems that the firm never reached that point when it became necessary to apply for license, and hence it cannot be said that Graham sustained any actual damages on account of the existence of Craig's lien.

The evidence in the case fully warranted the chancellor in ordering a sale of the partnership property, and as the lien of Craig was removed before the hearing, his judgment, so far as this court has power to revise it, is affirmed.

Lindsay, for appellant.

Craddock, for appellees.

J. N. HUGHES' ADMR. v. J. N. CRAIG.

Execution—Sale Under—Sale Bond—Payment—Failure of Title—Creditor Not Bound to Refund to Purchaser.

Although the title to property sold under a *fiel facias* be absolutely worthless, yet the right of the plaintiff to the money is not impaired thereby. The bond of the purchaser and the return of the officer that he has sold the property, and taken such bond, completely discharges the judgment and stands in lien of it, and as between the creditor and debtors is a complete discharge while it remains in force.

APPEAL FROM LINCOLN CIRCUIT COURT.

April 27, 1871.

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OPINION BY JUDGE PETERS:

Hughes and Craig, being each creditors of Mrs. M. Gilbert, sued her in the Lincoln circuit court, and recovered judgment for their respective debts; an execution in favor of Hughes was first issued and placed in the hands of the sheriff, and then one issued in favor of Craig and was also placed in the hands of the sheriff, who levied them both on the life estate of the defendant in a tract of land, in Lincoln county or on her interest in said land, which it seems the sheriff and Craig believed was a life estate. This supposed life estate was sold, and Craig, the plaintiff in one of the executions thus levied, purchased. The executions were then levied on the equity of redemption in said land and Craig became the purchaser at a price sufficient to pay both debts, and the sales being on a credit of three months, Craig executed a bond payable to Hughes for the amount of his debt.

The sheriff then conveyed the interest which he supposed Craig acquired by his purchases, to him, and he brought a suit in equity against Mrs. Gilbert for possession under his sheriff's deed. She resisted a recovery on the ground that she had no vendible interest in the land, but alleges that she held it under the will of her late husband in trust for his children and exhibits the will as a part of her answer. Craig seems to have concurred in that view of the case, and after Mrs. Gilbert filed her answer, amended his petition and alleged that the debts for which the judgments were rendered, were for necessities furnished the children of the testator, making them defendants, and prayed for a judgment against them and for a sale of so much of the land as would be sufficient to pay said debts; and further alleged that he had paid off and satisfied the bond executed by him for the debt to Hughes, and prayed that if the court should adjudge that he took nothing by his purchase of Mrs. Gilbert's interest in the land, or that she had no interest, for a judgment against Hughes for the money he had paid him on the bond aforesaid, making Hughes a defendant.

The court below adjudged that Mrs. Gilbert merely held the land in trust for the use of the beneficiaries named in the will of her testator, quashed the sale made by the sheriff and set aside

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his deed to Craig, and further adjudged that Hughes should restore the money to Craig paid by him on the land. Hughes, having died, his administrator has brought the case to this court to revise said judgment.

It is not alleged that Hughes (who was living at the date of the levy and sale by the sheriff) either directed him to make the levy, or sale or in any way undertook to control his action in the management of the execution, and the question is presented whether the personal representative of Hughes is bound to refund the money to him, the title to the property which he purchased having proved defective.

The very early cases of *McGee vs. Ellis and Browning*, 4 Littell, 244, would seem to be decisive of this case.

After quoting Dalton on the office of sheriff, the judge who delivered that opinion said:

"If this authority be taken as law, it clearly shows that, although the value of the goods sold under a *feri facias* be recovered of the purchaser, yet the right of the plaintiff to the money is not impaired thereby. If the contrary doctrine be true, that the creditor is responsible for the validity of the title, he could not be entitled to the money after that title had failed by a suit against the sheriff, which is the case put by Dalton.

"Nor do we conceive that the circumstance of a sale bond being taken, and the money being in transitu, and not in fact paid, varies the question.

"The bond of the purchaser and the return of the officer that he has sold property and taken such bond completely discharge the judgment and stand in lieu of it, and as between the creditor and debtor is as complete a discharge while it remains in force, as a return that the money was made and ready to render."

The decree of the court below adjudging to the purchaser the price of the property against the plaintiff in the execution was reversed, and the reasoning of the learned judge who delivered the opinion, and the conclusion of the court in that case have been approved not only by an acquiescence of many years, but in the late case of *Ettlinger, etc., vs. Tansey, etc.*, 17 B. Monroe 364. The case in 4 Littell *supra* is referred to, approved, and upon its authority the same question is settled.

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But it is insisted by the counsel for the appellee that the property sold and about which the controversy arose, in the two reported cases was personality, while the controversy in this case grows out of a sale of real estate and therefore a different rule should prevail. Even if that were so, we can not see any reason for such a distinction, but counsel is mistaken in his facts. The controversy in the case of *Ettlinger, etc., vs. Tansey, etc., supra*, grew out of the sale of a lot of ground in Louisville.

The judgment of the court below must therefore be reversed, and the cause remanded with directions to dismiss the petition as to Hughes' representative.

Durham & Jacobs, for appellant.

Harris, Dunlap, for appellee.

H. Y. GARDNER v. C. S. GREER.**Bills and Notes—Failure of Consideration.**

If the note sued on was not given in consideration of the sale of the note on Thomas, but only for a promised loan of the money expected to be paid by Thomas, which was never made, there was a failure of consideration; although the defendant may have incurred a liability by laches in not collecting the note on Thomas, such negligence did not render the note of the defendant obligatory if the anticipated consideration failed.

APPEAL FROM WARREN CIRCUIT COURT.

December 20, 1870.

OPINION BY JUDGE HARDIN:

The instruction marked "B," given on the last trial at the plaintiff's instance in effect that, although the jury might believe from the evidence that the defendant took the note on Thomas to collect and not as a purchaser as alleged in the answer, yet the jury should find against him on the note given by him, if he failed to use proper diligence, and might thereby have made the debt of Thomas, seems to us to have been misleading and erroneous.

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If it were true, as alleged in the defense, and there was some evidence conducing to prove, that the note sued on was not given in consideration of a sale of the note on Thomas, but only for a promised loan of the money expected to be paid by Thomas, which was never made, there was a failure of consideration; although the defendant may have incurred a liability by laches in not collecting the note or withholding it, if by so doing loss or injury resulted to the plaintiff, but such neglect did not render the note of the defendant obligatory if the anticipated consideration failed. We perceive no valid objection to the other instructions and rulings of the court, nor does it appear that there was such abuse of the discretion of the court in setting aside the first verdict as to authorize the affirmance of the judgment rendered thereon, and set aside by the court.

Wherefore, the judgment is reversed and the cause remanded for a new trial and for further proceedings not inconsistent with this opinion.

Underwood, for appellant.

Bates, for appellee.

FRED K. HANK v. HIRAM HANK.

Limitation—Time When Statute Begins to Run—Allegation of Petition.

The allegation of the petition as to the date of the contract will be regarded as the correct date in considering the question of limitation.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

October 27, 1870.

OPINION BY JUDGE HARDIN:

This was a suit in equity by the appellee, Frederick Hank, against the heirs of his deceased son, Joseph Hank, to recover the possession of a tract of land, and for an account of rents and a judgment for an alleged balance thereof. The petition setting forth in substance that in or about the year 1844, the plaintiff being indebted to James Terrill in about \$300, secured by a

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mortgage on the land, Joseph Hank paid the debt, and to reimburse him, the plaintiff made a parol agreement, giving up the land to him to be used until the rents would repay the amount advanced, Joseph Hank agreeing to improve the land and support the plaintiff and he was to retain the possession of the land until fully reimbursed the amount of the debt, interest and costs, and, although long since so repaid, he and his heirs have continued in the possession of the land.

The defendant by their answer denied the right of the plaintiff either to be restored to the possession or to have an account of rents as imported by the averments of the petition; but admitting the contract to have been in parol, they alleged that in its terms it was an unconditiinal sale to Joseph Hank of the land for the amount paid to discharge the debt and mortgage of Terrell, and that the possession of Joseph Hank from the time it was acquired, was in his own right and adverse to any claim or right of the plaintiff and they pleaded the statute of limitations as a bar to the action.

Under an interlocutory order of the court, a commissioner reported an account showing a balance in favor of the plaintiff of \$392, after setting off the amount of Joseph Hank's payments to Terrell, and improvements made by him on the land, and thereupon the court rendered a judgment for the recovery of the land, and said sum of \$392, and this appeal is from that judgment.

The terms of the contract and character of the possession are, we think, sufficiently proved as alleged by the defendants; and, though the evidence conduces to show that the arrangement was of later date than 1844, as that is the date of the contract alleged by the plaintiff himself, we must regard it as the correct date inconsidering the question of limitation; and twenty-two years or near that time having elapsed when this suit was brought, it results from the adverse character of the possession that the statutory bar had become complete when the suit was commenced. Wherefore the judgment is reversed and the cause remanded with directions to dismiss the petition.

Carter, Rodman, Dishman, for appellants.

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B. HILLERICK *v.* W. C. WHITAKER.**Attachment—Claim by Third Person—Reference to Master—Commissioner's Report—Judgment Not in Conformity to Report.**

Where a third person claims the property attached and the question of ownership is referred to the master for proof and report, and the commissioner reported that some of the property attached belonged to a third party, which report was confirmed, it was error to adjudge that all the property attached be sold.

APPEAL FROM LOUISVILLE CHANCERY.

September 8, 1871.

OPINION BY JUDGE PETERS:

When the attachment in this case was levied, appellant was present and, from the evidence of Mills and others who were also present on that occasion, it appears that he claimed then one spring wagon, there being two on the premises, the engine and boiler, and the beer kegs, the other property he set up no claim to, but admitted it belonged to his son, the obligor in the note sued on.

We do not feel authorized therefore to decide that the chancellor should not have subjected the property to which appellee then set up no claim, to sale for the payment of appellee's debt.

But before appellant was made a defendant to the action, judgment was rendered, subjecting the engine and boiler and the 95 beer barrels with the other property levied on to sale to satisfy the debt.

After the judgment was rendered on his petition, appellant was made a defendant to the action, and he asserted a claim to all the property attached. The case was then referred to the Master to take proof and to report to whom the property belonged. He reported that the engine, boiler and 95 beer kegs did not belong to the defendant, or rather that the debtor to appellee owned all the property attached, except the articles named, and the evidence showed conclusively that they belonged to appellant. Notwithstanding the evidence and the report of the Master and the confirmation thereof by the court, still the chancellor ordered and adjudged that the marshal should proceed to sell the at-

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tached property in conformity to the former decree previously entered, whereby the engine, boiler and 95 beer kegs were subject to sale, which is evidently erroneous. And for that error the judgment must be *reversed* and the cause remanded with directions to discharge the attachment as to the engine, boiler and 95 beer kegs, and for further proceedings consistent herewith.

Wood, Drane, for appellants.

Whitaker & Gowdy, for appellee.

GEORGE HAZELRIGG *v.* J. W. PRATER, ETC.

Bills and Notes—Payment and Discharge—Confederate Currency.

A payment on a note in confederate currency, made and accepted within the military lines of the confederate states is valid.

APPEAL FROM MORGAN CIRCUIT COURT.

April 11, 1871.

OPINION BY JUDGE HARDIN :

The evidence sustains the conclusion that the plaintiff's intestate, Thomas H. Hazelrigg, while residing at Whitville, Virginia, in 1862, received of William Lykins, through George Cox in Virginia, \$494, or about that sum, in confederate currency, as a payment on the notes sued on in this action.

This payment, so made and accepted, within the military lines of the confederate states, was a valid payment of the promised sum so received, according to reported decisions of this court; and the judgment rendered for the plaintiff seems to embrace the full amount of the balance due upon the notes.

Wherefore the judgment is affirmed.

Hazelrigg, for appellant.

Botts, for appellee.

B. M. JONES *v.* THOMAS BARBER.

Signatures—Proof—Non Est Factum—Comparison of Handwriting.

It is error, on the trial of an issue of non est factum, to permit the plaintiff, against the objections of the defendant, to prove certain papers produced by the witness, to have been executed by the de-

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fendant, and to submit them to the jury, to prove by comparison, that the note sued on was signed by the defendant.

APPEAL FROM BOYLE CIRCUIT COURT.

May 23, 1871.

OPINION BY JUDGE HARDIN :

This action was commenced by Clifton Rodes against Mitchell and Jones, as makers, and Barber, as endorser of a negotiable note for \$5,300, which, during the pendency of the suit was assigned to Barber, who by an order of court was substituted for the plaintiff, and the case being dismissed as to Mitchell, progressed to a trial and judgment against Jones, who prosecutes this appeal for a reversal of the judgment.

The principal issue tried, being on a plea of *non est factum*, the only essential question is as to the action of the court in permitting the plaintiff, against the objection of the defendant, to prove certain paper, produced by the witnesses, to have been executed by the defendant, and to submit them to the jury to prove by comparison that the note sued on was signed by the defendant.

This was erroneous according to reported decisions of this court. (*Woodard, etc., vs. Spiller*, 1 Dana 179; *McAlaster vs. McAlaster*, 7 B. Monroe 269; *Hawkins v. Grimes*, 13 B. Monroe 257.)

Wherefore the judgment is reversed and the cause remanded for a new trial and other proceedings not inconsistent with this opinion.

James, Harding, Thompson, for appellant.

Durham, Van Winkle, for appellee.

WM. HUNTER, ETC. v. C. W. CARTER.

Conversion—Personal Property—Possessions—Right of Action.

The bare possession of personal property, without the absolute or strict legal title confers a right of action against a mere wrong-doer having no right and not clothed with any authority from the real owner.

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APPEAL FROM MORGAN CIRCUIT COURT.

April 11, 1871.

OPINION BY JUDGE PETERS:

The evidence shows that appellees were in the actual possession of the mare sued for at the time she was taken, and the general rule as to personal property is that bare possession without the absolute or strict legal title confers a right of action against a mere wrong-doer having no right and not clothed with any authority from the real owner, 1. *Chit; pleadings* 151. Here no evidence was introduced to show that appellants had acquired the title of the United States government or of Col. True, and in the absence of such proof, appellee's possession gave him a right to recover, consequently the instructions asked by appellants were properly overruled, and if they borrowed the mare from appellee, the instruction given on his motion was more favorable to appellants than it should have been in as much as the jury was told if they borrowed her and returned her within the time stipulated for her return, the law was for them, regardless of her condition at the time they returned her.

Wherefore the judgment must be affirmed.

John W. Hazelrigg, for appellants.

 L. C. KASH *v.* G. C. EVERETT, ETC.

Set-Off and Counter Claim—Set-Off Which Could Have Been Plead at Law Cannot be Plead in Equity.

A set-off which could have been successfully pleaded at law cannot be plead in a suit in equity.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

April 17, 1871.

OPINION BY JUDGE PETERS:

If, as seems to be the case, appellants had assigned the notes described in the petition to John W. Clay and he had collected the same before he had assigned the note he held on them to Ev-

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erett, they could have successfully pleaded them, by way of set-off in Everett's action at law against them, but after judgment at law was rendered under Section 14, Civil Code, they can not make that defense available in equity, especially as it is not alleged, nor proved, that they were prevented from defending the action at law by any thing that Everett did or said.

Wherefore the judgment is affirmed.

Apperson & Reid, for appellants.

Turner, for appellees.

P. T. GERMAN, ETC., v. MULDOOM & BULLITT & Co.

Contracts—Written Instrument—Names in Body—Delivery—Presumption—Burden of Proof.

The fact that the writing is in the possession of the appellees, raises the legal presumption that it was delivered to them by the parties that did sign it, and it was, therefore, incumbent upon them to rebut this presumption or to establish that appellees undertook to procure the signatures of all the parties mentioned in the body of the writing.

Contracts—By Committee—Personal Undertaking.

The appellants are described in the writing as a committee but their undertaking to pay the agreed price for the monument is personal in its character.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

May 10, 1871.

OPINION BY JUDGE LINDSAY:

There is nothing in the written agreement upon which this suit is based indicating that the appellants were not to be bound thereby unless it was signed by all the parties whose names are mentioned in the body of the instrument. The fact of its being in the possession of the appellees raises the legal presumption that it was delivered to them by the parties who did sign it.

It was therefore incumbent upon them by proof, either to rebut this legal presumption, or to establish the allegation made in their answer that the appellees undertook to procure the signatures of all the parties mentioned in the body of the writing. As to both of these points there is an utter failure of proof.

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It is true that the appellants in the writing are described as a committee, but it is also true that their undertaking to pay the agreed price for the monument is personal in its character. They term themselves the party of the second part and agree to pay to appellees the subscriptions as fast as collected, and in any event, to pay them in full the amount of the contract price, when the monument is completed. From the entire writing it is clear that they undertook to pay to appellees the agreed price for the monument and themselves to look to the subscribers for the means to fulfill these obligations. The court below in giving and refusing instructions conforms to this view of the law.

Wherefore the judgment is affirmed.

Elliott, for appellant.

Barrett & Edwards, for appellees.

CRAVEN GARRETT'S HEIRS *v.* LLEWELLYN POWELL AND OTHERS.

Fraudulent Conveyances—Voluntary Conveyance—Bona Fide Purchaser—Notice—Actual and Constructive.

Constructive notice arising from the recording of a voluntary conveyance is not sufficient to effect the conscience of a bona fide purchaser. Actual notice is necessary for this purpose.

APPEAL FROM BULLITT CIRCUIT COURT.

January 21, 1871.

OPINION BY JUDGE LINDSAY:

The appellants claim title to the land in controversy under a voluntary conveyance made in 1847, by their ancestor to Stilwell Heady in trust for himself for life, remainder to his wife, Sarah Garrett (now deceased), for life, and remainder to these appellants.

Their said ancestors afterwards, in 1851, sold and conveyed for a valuable consideration the same land to the appellee Powell, and Merker and Bergman claim under him.

Powell denies that at the time of his purchase he had notice of the existence of the voluntary conveyance under which appellants claim, and there is no proof in the record, except the fact

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that said conveyance was duly recorded, tending to establish this essential fact.

Constructive notice arising from the recording of a voluntary conveyance is not sufficient to affect the conscience of the purchaser. Actual notice is necessary for this purpose. There may be constructive notice where there is no actual notice.

In this case it is not denied that Powell was a bona fide purchaser, and as he had no actual notice of the voluntary conveyance to Heady it must be regarded and treated as fraudulent as to him. *Enders vs. Williams*, 1st Metcalfe, 353.

As appellants could not have held the land as against Powell and his vendees in any event, it is unnecessary to inquire whether the judgment in the case of *Garret vs. Heady* and others was regular or not. Its vacation would not have benefited them in the slightest degree. Judgment affirmed.

Rodman, R. H. Field, Bush & Merrell, for appellants.

Dembits & Wehle, Bramlette, for appellees.

THOS. GREER, ETC., v. THOS. K. FLEMING.**Bill of Exceptions—Extension of Time to Day in Succeeding Term.**

The circuit court may extend the time for filing a bill of exceptions to a day in succeeding term, but it must be filed on that day or the right to file will be lost.

APPEAL FROM KENTON CIRCUIT COURT.

May 4, 1871.

OPINION BY JUDGE LINDSAY:

The circuit court had the right to extend the time for filing the bill of exceptions and evidence to any day in the succeeding term. It appears, however, that no notice whatever was taken of said bill on the day fixed, nor for several days thereafter. "According to the doctrine in the case of *Bailey vs. V'illier*, 6th Bush 28, the day for filing the bill (having been fixed and passed without any notice of the subject being taken) the opportunity for filing the same was lost.

Wherefore the bill of exceptions in this case cannot be re-

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garded as part of the record. This leaves for our consideration only the pleadings.

It is not claimed that the answer does not prevent a complete and perfect defense to the action, and as we cannot consider anything in the bill of exceptions, we must presume that the action of the circuit court was correct.

Judgment affirmed.

Benton, Lincoln, for appellants.

Carlisle & O'Hara, for appellees.

H. H. HAND v. JOHN EIBECK.

Vendor and Purchaser—Deficit—Mutual—Mistake—Sale in Gross.

As the land sold, in gross, for 25 acres only contains fourteen acres by actual survey, the deficit is so great as to strike the mind of the chancellor, at once, that both parties were laboring under a mistake as to the number of acres contained in the tract.

APPEAL FROM PENDLETON CIRCUIT COURT.

September 20, 1871.

OPINION BY JUDGE PRYOR:

The appellant on the 13th day of February, 1869, sold to the appellee a tract of land in Pendleton county for the sum of five hundred dollars, two hundred of which sum he paid in hand, and executed his two promisory notes for the balance, payable in the years 1869 and 1870. A bond for title was executed to apperee expressing the consideration already made, giving the boundaries of the land and including this clause: "said tract containing twenty-five acres, more or less." The appellant instituted his suit in equity to enforce the contract and subject the land to the payment of the purchase money. The appellee answered and resisted any judgment against him except for a small sum for the reason as he alleges that he bought the land by the acre, and that the appellant fraudulently represented the tract as containing twenty-five acres, when it only contained fourteen acres. Much testimony has been taken on both sides in regard to the contract, but the writing itself must be regarded as the best evi-

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dence of the agreement of the parties. The writing shows that it was a sale in gross, still the appellee was entitled to relief if the deficit was so great as to authorize the court to say that it was the result of either fraud or mistake. The land sold by actual survey made, contains about fourteen acres, a deficit of nearly one-half of the quantity supposed to be in the tract. The land was worth at the time fifteen or twenty dollars per acre and the appellee seems to have agreed to pay every dollar it was worth. The deficit is so great as to strike the mind of the chancellor at once that both parties were laboring under a mistake as to the number of acres in the tract when the same was executed. The case in 2 Bibb of *Young vs. Craig*, 270, is in aid of the judgment rendered here. Therein a sale of land estimated at 425 acres, this court refused to grant relief when it held out 481 acres, but if the surplus had been as great as one-third or one-fourth the judgment would have been different. We are not disposed to disturb the judgment of the court below. That judgment is affirmed.

Lee, for appellant.

Ireland, for appellee.

WM. R. HODGES v. PETER T. CASSITY, ETC.**Evidence—Competency—Exceptions Not Passed on Waived.**

Where evidence is excepted to, as incompetent, and the court below fails to pass on the question it must be regarded as waived.

Pleadings—Amount Claimed in Original Petition—Amendment Claiming Greater Sum.

It is not probable that in stating the amount due, in his original petition, the plaintiff would from mere forgetfulness, state it at less than one half of the real sum.

APPEAL FROM ROWAN CIRCUIT COURT.

January 6, 1871.

OPINION BY JUDGE PETERS:

In 1854 or 1855, when Peter Cassity, the decedent, was competent, he contracted with Hawkins to take care of and maintain himself and wife, and let him have the use of a lot or two convenient to the house for the rent of the residue of the farm, this ar-

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rangement according to the evidence of Hawkins and wife was broken up by the appellant; their evidence was excepted to, but the exceptions were not passed on by the court below and must be regarded as waived. After the contract with Hawkins was concluded, appellant and his wife prevailed on Peter Cassity and wife to remove to their residence and appellant took upon himself to dispose of and manage the estate of Peter Cassity until his death, rented out his land and collected, and appropriated the rents which are variously estimated at from \$150 to \$45 per annum, but which might be fixed at \$75 per annum which is less than Phelps estimated the annual rent at, who appears to be a practical man and free from bias either way, putting the rent then at \$75 per annum, a price at which the farm might have been rented, for the period the decedent remained at appellant's house, except some intervals of a few months, would make \$525. Peter Cassity held a note on appellant for \$180, which was unpaid at his death, unless settled in the way of board. Appellant was further indebted to him for the proceeds of personalty sold, and other debts owing to decedent in an amount over three hundred dollars, making over one thousand dollars and the \$150 allowed him by the judgment of the court below in addition thereto, increases the amount to about \$1,500, more than double the amount claimed by appellant in his original petition. Nor is it probable that in stating the amount due him in his petition that he would from mere forgetfulness, state it at less than one-half of the real sum and, although he afterwards offered to amend his petition, increasing the amount which he claimed, still he does not even, if that amendment was properly before us, satisfactorily account for his failure to make a nearer approach to the indebtedness of decedent to him in his original petition. But the paper found in the record stated by the Clerk to be the amendment offered cannot be regarded by this court. It does not appear to have been filed and, unless it was filed, it could only be made a part of the record by a bill of exceptions making it a part thereof.

Considering the relation of the parties, and the facts and circumstances developed in the record, we feel satisfied with the judgment of the court below, and therefore affirm it on the original and cross appeals.

Lacy, for appellant.

Phister, for appellee.

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STEPHEN P. HOGG *v.* A. J. FRAIZER, ETC.

Sheriffs and Constable—Neglect of Official Duty—Motion—Jurisdiction.

The question of jurisdiction is the only question involved in this appeal and that was settled in the cases cited below.

APPEAL FROM OWSLEY CIRCUIT COURT.

April 12, 1871.

OPINION BY JUDGE PETERS:

This was a motion instituted by appellant against Appellee Fraizier, constable of Breathitt county, and his sureties in the Owsley quarterly court, for neglect of official duty on the part of Fraizier in Breathitt county.

The quarterly court having rendered judgment for appellant for the amount claimed, Fraizier appealed to the circuit court, and there the motion was dismissed, from which judgment this appeal is prosecuted.

The question of jurisdiction is the only one involved in this appeal and that is settled by this court in two recent cases, after being elaborately argued and maturely considered, adversely to appellant. The first is *Groom's Administration v. Pickett*, 4 Bush 372, and second, *Foster, etc., v. Wade and the Commonwealth*, 1b. 628. It had been previously adjudicated by this court in *Bank of Ky. v. Harrison, etc.*, 1 Bush 384, but at the solicitation of counsel the question was again considered in the cases cited and the last named decision approved.

The judgment must therefore be affirmed.

Hogg, for appellant.

Lilly, for appellee.

JOHN C. HARDMAN & WIFE *v.* SAMUEL A. BARCLAY, ETC.

Ejectment—Proper Parties—Tenant in Possession Must be Sued—Defective Allegation.

The original petition was defective in not distinctly stating who was in possession of the land sought to be recovered, and the alternative averment in the amendment, that the property was in the actual possession of the defendant or some tenant under her. The tenant in possession must be sued.

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Ejectment—Constructive Possession—Legal Title.

One who does not hold the legal title cannot be constructively in the possession of real estate.

APPEAL FROM WARREN CIRCUIT COURT.

April 13, 1871.

OPINION BY JUDGE PETERS:

Appellants, according to the allegations of their petition, have the legal title to the part of the lot therein described and have the right to the possession thereof. The Civil Code defines their remedy, and the proper court in which to seek it, and a form of a petition for the recovery of real estate is appended thereto, the original petition was defective in not distinctly stating who was in the possession of the part of the lot sought to be recovered; and the amendment did not remedy the defect, the alternative averment that the property was in the actual possession of Stubbins, "or some tenant under her," does not state who is in fact in possession; the tenant in possession must be sued, and the averment as to who that person is must be direct and positive. Stubbins, according to the petition, may or may not be in possession, consequently it is uncertain whether appellants have a cause of action against her or not, nor is the averment amended by the expression that she is "actually or constructively in possession." One who does not hold the legal title cannot be constructively in possession of real estate. If appellants' original, or amended petition, had stated facts sufficient to constitute a cause of action, it would have been proper for the court below to have transferred the case to the court having common law jurisdiction; but as neither contained such facts there was no error in dismissing them without prejudice to another action.

Wherefore the judgment is affirmed.

Rodes, for appellant.

Dulaney, for appellee.

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ALFRED HENSLEY *v.* NAT HOLLY AND OTHERS.**Statutes—Private Acts—Notice—English Rule.**

An act of the legislature, although private, technically private in its character, is notice to all the citizens in Kentucky.

The English rule with regard to private acts of Parliament does not prevail in this state, where all the acts of the General Assembly, private as well as public, are published at the public expense.

Public Lands—Possession at Time of Entry—Notice Junior Patentee.

The actual possession by the appellees at the time Hensley made his entry and procured his patent, was enough to put him upon his inquiring as to the nature of their claim.

APPEAL FROM MARSHALL COURT OF COMMON PLEAS.

December 8, 1870.

OPINION BY JUDGE LINDSAY:

This was a triangular contest between the heirs of Edward Curd and Alfred Hensley, as to the ownership of a certain quarter section of land in Marshall county.

The land in contest was entered in the land office at Widesboro in the year 1833 in the name of Edward Curd, and was shortly thereafter surveyed by Edward Curd, senior, who at that time and whilst upon the land, claimed to be the party who had made the entry. Said entry was not carried into a patent during the life time of said Curd, but on the 17th of February, 1866, his heirs procured the passage of an act of the General Assembly directing the register of the land office to issue a patent for said land in his name, which was accordingly done on the 30th of November, 1866.

In the meantime Hensley had entered the same land in the land office at Mayfield and procured a patent therefor on the 19th of May, 1866. This action was instituted by the heirs of Edward Curd, who finally dismissed their petition, but the litigation was kept up between the heirs of Edward Curd, Sr., and Hensley.

Upon hearing, judgment was rendered in favor of Curd's heirs, and Hensley prosecutes this appeal. He insists that Curd's heirs, by failing to carry the entry of 1833 into patent within the

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time prescribed by an act of the General Assembly, approved the — day of March, 1858, forfeited all claim to the land under said entry. "That the act of February 17, 1866, was a private statute, and did not operate as notice either actual or constructive, of the rights Curd's heirs acquired thereunder. That he had no actual notice of its passage nor of the claims of appellees. That he acquired his title in good faith, and that as he holds the elder patent, he is in estimation of law, the owner of the land and entitled to the possession of the same."

The pleadings and evidence warrant the conclusion that Holly and others who entered under the heirs of Edward Curd, Sr., were in the actual possession of the land at the time of the passage of the act of February 17, 1866, as well as at the time of the subsequent entry by Hensley of the same.

The act of February the 17th, 1866, invested them with at least an equitable title to the land as against the Commonwealth of Kentucky, and all who might subsequently acquire title through or from her. We cannot admit that said act, although technically private in its character, was not notice to all the citizens of Kentucky. The English rule with regard to private acts of Parliament does not prevail in this state where all acts of the General Assembly, private as well as public, are published at the public expense.

Besides the actual possession by the appellees at the time Hensley made his entry and procured his patent, was enough to put him upon enquiry as to the nature and extent of their claim. If these conclusions are correct, of which we entertain no doubt, it is evident that Hensley cannot be regarded as an innocent purchaser without notice.

Wherefore the judgment of the court below is affirmed.

Lindsey, for appellant.

Stubblefield, Gilberts, for appellees.

R. P. HOLLOWELL v. J. & W. HODGES.

Bills and Notes—Notice by Surety to Sue—Waiver—Estoppel.

In this case the surety offered to give the payee a written notice to sue the principal but he waived it saying that he did not require it and accepted a verbal notice as sufficient. This amounted to an

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express waiver of his statutory right to require the notice to be in writing, and he is thereby estopped from claiming that the notice there given was not legal and sufficient.

APPEAL FROM LYON CIRCUIT COURT.

January 12, 1871.

OPINION BY JUDGE LINDSAY:

The defense relied upon by the appellant by his answer in this case falls very far short of that set up by Hamblin in the case of *Hamblin v. McCallister*, 4 Bush 418. In that case the surety offered to give the payee of the note a written notice to sue, but he expressly waived it, saying that he did not require it. That he waived a written and accepted the verbal notice as sufficient. This amounted to an express and unmistakable waiver of his statutory right to require the notice to be in writing, and as the law then stood he was estopped from claiming that the notice there given was not legal and sufficient. The answer in this case sets up no such express waiver—nothing seems to have been waived relative to either a written or verbal notice, and to imply a waiver upon the part of the appellee of his statutory right from his mere assurance that he would sue at once, would be in effect to abrogate the statute. The court properly sustained the demurrer to the appellant's answer.

Judgment affirmed.

*Hewlett, for appellant.**Wake, for appellee.*

JAMES GRAHAM & Co. v. DUCKWALL, FITCH & Co.**Brokers—Who is a Broker?**

A broker is a mere negotiator between other parties and never acts in his own name, but in the name of those who employ him, he is not intrusted with the custody or possession of the goods; he is employed to sell and is not authorized to buy and sell in his own name.

Factors—Who is a Factor?

A factor is one who may buy and sell in his own name as well as in the name of his principal, and is intrusted with the possession, management, control and disposal of the goods to be bought and sold, and has a special property in them.

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Brokers—Sale by—Notice to Purchaser.

As appellees were informed that the goods was not in the possession of the party from whom they made the purchase; this was enough to put them on their enquiring as to who was the owner and in what character the seller acted in making the sale.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

May 9, 1871.

OPINION BY JUDGE PRYOR:

The court, being sufficiently advised, delivered the following opinion herein, to-wit:

This action was brought by appellants, wholesale groceries in the city of Philadelphia, against appellees, grocers in that part of the city of Louisville known as Portland, to recover from them \$1,130.18, the price of a bill of goods sent to them by appellants, of which a bill of particulars is filed and made part of the petition dated December 4, 1867.

Appellees in their answer deny that they even purchased a bill of goods of appellants at any time whatever, and deny that they owe them \$1,130.18 or any part thereof or any sum of money whatever, but state that some time in November or early in December, 1867, Cutter Bennett & Co., doing business as commission merchants in Louisville, called on them at their place of business in Portland and offered to sell them coffee and syrup by sample on thirty days' time, and exhibited to them the samples of the articles they proposed to sell, informing them that they did not have the articles which they proposed to sell them in store but said they had them somewhere in the east, and it would be about two weeks before they could deliver them; that they told said Cutter, Bennett & Co. if their coffee and syrup corresponded with the samples they would take a specified quantity of each at the price at which they offered them; that the goods were shipped to them by rail a part from New York, and a part from Philadelphia, but that they did not receive with them, nor by mail or otherwise any account or letter of advice to inform them that said goods were the property of any other person than Cutter, Bennett & Co., and at the expiration of thirty days, the time on which they made the purchase, they

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paid Cutter, Bennett & Co. \$1,127.18, the price which they agreed and promised to pay for said goods.

They further state that when they purchased the goods they believed Cutter, Bennett & Co. were the owners; that no other person or persons were disclosed to them as the owners, and they paid them therefor, believing at the time that they alone had the right to receive the price.

By an amended petition appellants charge that Cutter, Bennett & Co. were merchandise brokers and, as such, sold the goods to appellees, and by their letter under date 2d of December, 1867, informed them of the sale and directed the shipment of the goods, which letter, with a duplicate of the bill of lading and bill of goods, they filed with their amended petition.

In answer to the amended petition appellees deny that Cutter, Bennett & Co. sold them the goods as brokers, or that they had any knowledge or information sufficient to form a belief as to whether or not they were brokers. They allege that Cutter, Bennett & Co. did business on 3d street in Louisville, where they advertised themselves as commission merchants and auctioneers; they deny that they had any knowledge or information sufficient to form a belief that said Cutter, Bennett & Co. were brokers or sold the goods as appellant's agent, and deny that they ever received a bill of the goods or a bill of lading.

After the pleadings were made up the issues of fact were submitted to a jury who found a verdict for appellees, and a new trial having been refused by the court below, judgment was rendered in conformity to the verdict from which this appeal is prosecuted.

When the evidence was closed three instructions were asked by appellants, all of which were refused and two given which were asked by appellees, and whether the court erred in refusing and giving instructions is the important question in this case.

For appellant it is insisted that Cutter, Bennett & Co. acted in the sale of the goods to appellees as merchandise brokers and not as factors or commission merchants, and that as the goods were sold by samples, and appellees were informed at the time of sale that they were not in the possession of Cutter, Bennett & Co. but were in the east and were to be shipped and delivered to them in two weeks thereafter, the law will infer that they

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knew that the goods belonged to other parties, and if they paid the price to Cutter, Bennett & Co. they did it at their own risk.

The correctness of this position is controverted by appellees and they contend that as the party who made the sale to them did not disclose the character in which he acted, they had a right to infer that he was the owner of the goods or, at most, that as Cutter, Bennett & Co. were doing business under a sign as commission merchants and auctioneers in dealing with them, the law would imply that they acted in the transaction as factors and, if in the latter capacity, a payment to them would be binding on the owners.

As the evidence was conflicting and the jury have made a verdict, we can not disturb their finding unless the court below erred in giving or withholding instructions, or in the admission or rejection of evidence the judgment must stand.

Mr. Justice Story, in his book on agency, section 28, defines a broker to be an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation for compensation, commonly called brokerage. Or, in the language of Lord Chief Justice Tindal a broker is one who makes a bargain for another and receives a commission for so doing. And Justice Story further says: Properly speaking, a broker is a mere negotiator between other parties and never acts in his own name, but in the name of those who employ him. Where he is employed to buy or to sell goods he is not intrusted with the custody or possession of them and is not authorized to buy or sell them in his own name. He differs from a factor in several important particulars. A factor may buy and sell in his own name as well as in the name of his principal. A factor is intrusted with the possession, management, control and disposal of the goods to be bought or sold, and has a special property in them. A broker, on the contrary, usually has no such possession, management, control or disposal of the goods, and consequently has no such special property or lien. *Ib.*, Section 34.

If a broker sells the goods of his principal in his own name (without some special authority so to do), in so much as he exceeds his proper authority, the principal will have the same rights and remedies against the purchaser as if his name had been disclosed by the broker. *Ib.*, Section 28.

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In section 109, Justice Story, in the same work: A broker employed to buy or sell goods without limitation of price has the incidental authority to bind his principal by any price at which he honestly buys or sells. So a broker authorized to sell goods without any express restriction as to mode, may sell the same by sample, or without warranty. Ordinarily he cannot make the contract in his own name, but ought to do it in the name of his principal. So he cannot buy or sell on credit, except in cases justified by the usages of trade. So a broker has ordinarily no authority *virtute officii*, to receive payment for property sold by him, and if payment is made to him by the purchaser it is at his own risk unless from other circumstances the authority can be inferred.

But factors stand in a different relation to their principals. The same author in section 110, says: Factors may sell the goods of their principal in their own name and may buy in like manner, and in each case the principal will be bound by their acts in the same way and to the same extent as if his own name were used. And in section 111: It is said they have a special property in goods consigned to them, and for money, if not for most purposes (except as between themselves and principal), they are treated as the owners of the goods and consignees for sale, such as commission merchants, are described as factors.

It is to this consideration that factors are to be treated as special owners of the property consigned to them that may be referred many of the rights and powers attributed to them.

They may sue in their own name for the price of goods sold by them for their principal, and of course they have a right in their own names to receive payments, to give receipts for payments, and to discharge the debtors from their official transactions, at least, unless notice is given to the contrary by their principal. *Ib.*, Section 112.

Having thus ascertained the difference between factors, or commission merchants and brokers and their respective powers and duties, we may, with more confidence, examine into the action of the court below in granting and refusing instructions.

Appellant asked the court to instruct the jury. First, if they believe from the evidence that the goods were shipped by them to and were received by appellees directly from them, and

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that Cutter, Bennett & Co. merely negotiated the sale between the parties and never had the goods in possession, the law was for appellants, unless they should believe from the evidence that Cutter, Bennett & Company had express authority from appellants to receive payment from appellees; this instruction was refused and one given on motion of appellees to the effect that if the jury believed from the evidence that Cutter, Bennett & Company sold the goods to them by sample without disclosing to them at the time that they were acting for appellants in making said sale, and appellees paid the price to Cutter, Bennett & Co. when due, without notice that appellants claimed the price and looked to them for payment, the law was for them.

We do not propose to enter upon an analysis of the evidence but to determine whether the first instruction asked by appellants was properly refused, it must be ascertained whether it was a mere abstraction or baseless proposition.

Appellees certainly knew that the goods were not in the possession of Cutter, Bennett & Co. when they made the purchase, for they were so informed, and they were also informed that they were in the east and would be shipped to them; and there was evidence conducing to show that they got a bill of lading with the names of appellants at the head of it showing their business, place of business; that they were the owners of the goods and shipped them directly to appellees, dispensing with all agents and consignees. This was enough to put appellees on the inquiry as to who were the owners of the goods and in what character Cutter, Bennett & Co. acted in making the sale, and to authorize the first instruction asked by appellants, and any instruction in conflict with it, is deemed erroneous.

Wherefore the judgment is reversed and the cause is remanded with directions to award a new trial and for further proceedings consistent with this opinion.

Gasley, Yeaman & Reineke, for appellees.

S. J. KITNEL *v.* JOHN A. HIGGINS.

Limitation—Statutes Of—Cause of Action Accrued In Another State—Removal to This State.

If appellee left the state of Arkansas before the statutory bar became complete and became a resident of Kentucky, he cannot avail

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himself of our statute, until he has resided here the full term of five years after giving our courts jurisdiction of his person.

APPEAL FROM FAYETTE CIRCUIT COURT.

September 26, 1871.

OPINION BY JUDGE LINDSAY :

The peremptory instruction in favor of the appellee was erroneous. If, by any rational deduction from the facts proved in the trial, a right of action might be maintained, the court should not instruct as in case of a non-suit.

In this case the defense relied upon is the statute of limitation. The cause of action accrued in the state of Arkansas, and whilst the evidence is not clear as to the citizenship of appellee at the time, inasmuch as he was then the lessee of a farm in the state and was present at the time of the conversion of the cotton gin, it may be assumed that he was then a resident of that state. It is not shown that he remained in Arkansas until by the laws of that state the action was barred by the lapse of time. Sec. 19, Art. 4, Chapter 63, R. S.

If he left Arkansas before the statutory bar became complete and become a resident of Kentucky, he cannot avail himself of our statute until he has remained here the full term of five years after giving our courts jurisdiction of his person.

The evidence does not show that he had resided in Kentucky five years next proceeding the institution of this action.

The onus was upon the appellee to bring himself within the statute. Failing to do so by evidence so satisfactory as to exclude any rational deduction against the existence of a state of facts sustaining his plea, the question should not have been taken from the jury.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

Allen & Morton, for appellant.

Waters, for appellee.

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HILLARY JOHNSON *v.* JOSHUA CHASE.

Judgment Based on Erroneous Commissioner's Report—Failure to Except—Partnership.

The Court of Appeals never stops to inquire whether there are exceptions to a master commissioner's report or not. If it is erroneous, and a judgment is based on it, and such judgment is appealed from, it is the duty of the Court of Appeals to examine and reverse erroneous judgments.

APPEAL FROM HART CIRCUIT COURT.

October 23, 1871.

OPINION BY JUDGE PETERS:

In March, 1865, this suit was brought by appellant against appellee to settle the accounts of a partnership which they had entered into to carry on the business of selling dry goods in a village in Hart county in August or September, 1858, the terms of which were reduced to writing on the 27th of September of said year, several weeks after they had commenced the business, as is recited in the writing. It contains no statement of the amount of capital to be advanced by the partners, or each of them. Nor does it show that either of them had advanced any capital in the adventure.

On the 6th of November, 1859, they agreed to dissolve the partnership to take effect on the 10th of March following. That agreement was also reduced to writing and it shows that they agreed that appellee had shortly before that time paid in Louisville, debts of the firm to the amount of \$2,058.66, and that appellant bound himself to pay the same amount on debts of the firm then owing in said city.

On the 12th of July, 1865, appellee filed an elaborate answer, having gotten the time extended from April to that time to file the same. In that answer he avers that when he has the time to do so he will file all the books and papers in his possession pertaining to the business, and will also present a full statement of all the assets and liabilities of the firm with a list of balances, showing that appellant was in his debt, as he claims, in a considerable amount.

On the day after this answer was filed the case was referred to the master to state and settle the partnership accounts and report the result of his investigations to court.

In May, 1869, the master reported a balance due from appellant to appellee of \$1,530.49 including interest on a part of the indebtedness. In November thereafter the court below confirmed this report and rendered judgment in favor of appellee against appellant for the precise amount reported to be due to appellee, with interest from the date of the judgment, and the costs of said litigation, and appellant, complaining of that judgment, now seeks its reversal.

The master in his report states that "by reference to the bill rendered of merchandise bought by the firm of Chase and Johnson during the continuance of the partnership filed in this action, and entered in a paper filed herewith as a part of this report, the *total* amount of merchandise bought by the firm of Chase and Johnson during the continuance of the partnership as shown by said bill amounted to the sum of \$10,467.48."

The commissioner further reports that the total "amount of merchandise sold by said Chase and Johnson (excluding the sale made to Johnson and Chase 21st of March, 1860, for which he executed three notes of that date amounting in the aggregate to the sum of \$1,423.53 and amount of invoice \$37.53), amounts to the sum of \$11,700.00, as shown by addition of the day book of said firm, in which all entries of merchandise sold appear to be entered, excluding also the store house built by said firm, which cost, as shown by said books, the sum of \$815. 98, which was sold to said Chase and for which he executed his note November 20, 1860."

The commissioner further reports that from the books of said firm of Chase and Johnson, during its continuance, it received cash amounting to the sum of \$10,255.59, as shown by paper filed with said (report marked "Cash Account") of Chase and Johnson, said sum of \$10,255.59 is to be deducted from the amount of merchandise sold, it is shown that the amount paid out by said firm is \$9,743.72 (see paper filed marked cash account of Chase and Johnson; also see receipts filed from 1 to 337, inclusive).

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He further states that of the \$11,700.00, the amount for which the goods sold, the sum of \$815.98, the price of the house, \$1,423.53, the price of the goods on hand when the dissolution took place, and \$37.53, the amount of goods omitted, are to be added, making the total sum of \$1,977.04, from which is to be deducted \$1,454.85, this amount of insolvent debts sold by order of court and to the sum left after making that deduction is to be added the sum of \$165.50, the price for which the insolvent debts sold, leaving the balance of \$12,687.69.

The commissioner reports that the books show that there was paid by the firm during its continuance for merchandise purchases, \$9,743.69, which will leave the "apparent" net profit, as the commissioner expresses it, of \$2,943.97, but from this is to be deducted \$200 for keeping horses; \$65.00, the amount of S. H. Thurman's debt due the firm and sold to S. H. Johnson; also \$25 boot in exchange of horse for mare; also \$25 loss on moving lumber, which the commissioner reports, will reduce the apparent net profits to the sum of \$2,528.97, which he charges to Chase for the purposes of the settlement.

The commissioner has evidently made a mistake in his addition and subtractions here, for the \$200 for keeping horses; \$65 for Thurman debt; the \$25 for boot between horse and mare, and \$25 loss on lumber when added make the sum of \$315, which, taken from \$2,943.97, will leave a balance of \$2,628.97 instead of \$2,528.97 as reported by the master to be charged to Chase.

But if it is stated in the report that the total cost of all the goods bought is just \$10,467.48, and that the firm paid for goods bought of its own effects the sum of \$9,743.69, which would leave the firm in debt only \$723.79, and to pay that the report shows a profit of \$2,528.97. But by the articles of dissolution it is agreed that Chase has paid out of his individual funds on the debts of the firm \$2,058.53 and that Johnson must pay a like sum on debts outstanding. Where these debts are, if the commissioner reports correctly, cannot be found, for if he is correct in his estimates, the two sums the partners have paid with what he reports Johnson must yet pay, will amount to \$3,393.27, more than the debts of the firm, and have the profits untouched, which presents a most extraordinary result.

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But Chase, in his answer, states that appellant, of the \$2,058.63 which he, by the articles of dissolution undertook to pay, had paid \$1,021.94 as shown on day book 13, p. 139, and the sum of \$77.38 as shown on page 154 same book, while in his report the master credits appellant only for the \$1,021.94 and wholly omits to credit him with the \$77.38, which is an error prejudicial to appellant.

Appellee is credited by \$500 for services rendered the firm with interest, and that forms a part of the judgment against appellant. By the terms of the dissolution he was to be allowed at the rate of \$400 per annum for his services where no one was assisting him in the business.

The firm commenced business, say about 1st of September, 1858, and dissolved 10th of March, 1860, making its continuance one year, six months and ten days. Shipp proves he was engaged as a clerk in the store when they commenced business and continued with them about three months then; that he was employed a second time and remained about four months, and a third time for thirty days, so that the whole time he was employed would equal eight months, leaving only ten months and ten days for which appellant should be paid at the rate of \$400 per year, making less than \$400 instead of \$500, which was erroneously allowed.

The allowance of \$200 for keeping two horses seems to be unreasonable from the proof, from which it appears the horses were sold in June or July, 1859, in less than one year after the firm commenced business, and it is not shown when the horses were taken to be kept. This allowance is based on the following question and answer of Shipp:

From what you know of the keeping of those horses, and of the provender bought for their use and their showing, what would you estimate the cost of keeping them from September, 1858, to the latter part of the summer, 1860? He answers: I would think it would cost near two hundred dollars—when he had before stated one had been sold in June, 1859, and the other perhaps last of July, 1859; but appellant is charged for keeping horses for about one year after they were sold and for about six months after the partnership was dissolved; nor does it

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appear from the report what became of the mare which was partnership property or that appellant ever got anything for her.

This court never stops to inquire whether there are exceptions to a master's report or not. If it is erroneous and a judgment is based on it and such judgment is appealed from, it is the duty of this court to examine and reverse erroneous judgments.

For the errors pointed out the judgment is reversed and the cause is remanded with direction to recommit the case to the master to ascertain and report whether the partners or either of them advanced any capital to said firm when it commenced business or during its continuance, and if so, how much each advanced; how much each drew out; the amount of goods purchased with the dates of each purchase; how much was paid for them out of the firm's assets and how much by individual assets; when the various payments were made; and all other matters necessary to a correct settlement of the partnership business.

W. B. Read, for appellant.

Barnett & Edwards, Howell, for appellee.

JOHN W. HOPKINS v. CHAS. CATLETT.

Bills and Notes—Assignment of Note—Mistake as to Amount Due—Equity Will Relieve.

Where a note already due, with several payments credited thereon, is assigned and by mistake or fraud in the calculation of the credits and interest the assignor is made to believe that there was only a balance of three hundred and thirty dollars due thereon, when in fact there was at the time six hundred and ninety-three dollars due, a court of equity will compel the assignee to refund to the assignor the amount in excess of the sum supposed to be due when the note was assigned.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

November 9, 1871.

OPINION BY JUDGE PETERS:

This suit was brought on a note executed by appellee to appellant on the 1st day of December, 1866, for one hundred dollars, due one day after date.

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In the answer, one being an original and the other an amendment, the following material facts are stated and relied upon as a defense and counter-claim. That a short time before the date of the note aforesaid, appellee had contracted to sell to appellant a small tract of land of twenty-six acres at the price of six hundred and fifty dollars, of which he paid three hundred and twenty-five dollars down and executed his note for three hundred and twenty-five dollars payable at a future day. That before this contract was made with appellant, appellee had contracted to sell the same land to Newton Carpenter, who had not paid for it, and who, as is alleged, had authorized appellee to sell the land to raise the unpaid purchase price, and when he made the contract with appellant he believed, and had a right to believe, that Carpenter would ratify the contract. But, afterwards, Carpenter refused to perform his agreement and thereby put it out of the power of appellee to execute his contract with appellants, and the terms of rescission were then to be adjusted. It is alleged that appellant claimed one hundred dollars as the damages he had sustained on account of appellee's inability to perform his contract, and the note sued on was executed as a settlement of his claim for damages, he refusing to settle on any other terms; that the \$325 previously paid on the land were to be refunded and appellant did not have the money; but he had with him a note on John A. Catlett, originally for \$1,500, executed 7th of April, 1857, due one year thereafter, and carrying interest from date with various credits endorsed, so that he did not know the amount unpaid on said note; that he handed it to appellant and requested him to calculate the interest, take off the credits, and see if the balance due was enough to pay him the \$325. He took the note and after some time, during which he seemed to be making the calculation, he told appellee there were due on said note about \$330; that he relied on what appellant told him as to the balance due on said note; made no calculation himself, and assigned him the note in satisfaction of the \$325 he owed him under the belief from the report of appellant that there was only due on it \$330, when, as he charges, there were, in fact, due and unpaid on said note, six hundred and ninety-three dollars, and he prays judgment for all that was due on said note on the 1st of December, 1866, after deducting \$330

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therefrom, and that the note sued on should be cancelled, setting up these matters in his answer as a counter-claim.

The allegations in the cross-petition as to the manner of making the calculation to ascertain the balance due on the note of John A. Catlett, by whom they were made and what appellant said was due on it, are not denied in the reply. On that subject he says, in his reply, "That while he gave him the John A. Catlett note referred to, as bonus, or earnest of his intentions to comply with his written agreement, he made the calculation on the amount due on same, and took a memorandum thereof, and handed it to this plaintiff, where he casually estimated the amount due on same by casting up the credits and deducting therefrom the face of the note, and satisfied himself that there was enough due on said note to induce him to believe that it was the intention of the defendant honestly and faithfully to comply with his written agreement hereinbefore mentioned, and if the defendant was not *conasant* of the amount due on said note, it was his own fault, he being quite an expert in figures. And the charge in defendant's answer that he was most grossly deceived and imposed on by this plaintiff as his confidential adviser and attorney, is absolutely false and without foundation in fact."

It is not a little surprising that after so much time was consumed and space occupied by writing a reply; to the very simple statement of facts that appellee handed the note to him to ascertain the true amount due on it; that he did make the calculation and reported the balance to be \$330, and relying on that statement appellee assigned him the note in satisfaction of the \$325 he had paid him on the land; that these important allegations should receive no special attention and should be left without a direct reply; and while it may be true that he did not in the character of "confidential advise and attorney" grossly deceive and impose on appellee, still he may have deceived and imposed on him in a different relation. Did he do so? This interrogatory is not directly responded to, and as there is no sufficient denial it must be taken as true. Nor is the averment that the balance due on J. A. Catlett's note when it was assigned to appellant was \$693 denied; and if it had been, the letter written to said Catlett by appellant, informing him that he held his

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note, giving the amount and credits, and the note Catlett executed to him for \$715.80 on the 18th of December, 1866, when he took up the old note for \$1,500, and the note he executed on the 18th of April, 1867, on renewal of the note of the 18th of December filed in the cause, proves the truth of the allegation.

Appellant, in his reply, says that he called in a witness, and in the presence of that witness demanded of the defendant a compliance with his contract, urging in addition to his legal obligation as a reason that he had sold the land for double what he had given defendant for it, and that he did not feel called upon by any principles of morality or legal obligation known to him to sustain so heavy a loss, and so informed defendant.

Appellant does not name the individual who offered him twice as much for the land as he gave for it, nor has he introduced any one to prove it. But he says in his reply that he asked that as an argument why he should have appellee to execute his note to himself for \$100 besides assigning him the note on J. A. Catlett, by which he got a note on a solvent man, secured too by a lien on real estate at a discount of more than one hundred per cent. This, he thinks, was "a pretty heavy discount and a hard bargain—one which in all probability a court of equity might not be willing to lend its aid to enforce, but after it has been executed, will not interpose to set it aside."

Whether or not an individual finding an acquaintance in great distress for money, declaring that unless he can raise it he will suffer greatly in property and character, and buys his land at one-half its value, and afterwards, by an unexpected event, without his fault his vendee is unable to execute the contract, and then in order to indemnify his vendee he assigns a note to him for nearly seven hundred dollars on a good and solvent man to refund three hundred and twenty-five dollars, a court of equity would relieve the debtor under such circumstances, we need not, in this case, decide. Since there are other grounds which forbid a court of equity from withholding its aid, those grounds have already been stated.

The manner in which appellant obtained the note on J. A. Catlett must fix his liability to refund, and the criterion for the recovery is the difference between what appellee actually owed him and the amount due on J. A. Catlett's note on the 1st of

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December, 1866, with the interest on that difference from the last named date till paid.

Wherefore the judgment on the original appeal is *affirmed* and on the cross-appeal it is *reversed* and the cause remanded with directions to render judgment in favor of appellee against appellant for three hundred and sixty-three dollars with interest at the rate of six per cent. per annum from the 1st day of December, 1866, till paid and costs, and that appellant's petition be dismissed at his costs.

Hopkins, for appellant.

Feland & Evans, for appellee.

D. M. KITTINGER *v.* HUMPHREYS, JETT & Co.

Vendor and Purchaser—Suit to Enforce Purchase Money Lien—Lien Must be Alleged in Petition.

In order to entitle the holder of a note for purchase money to a lien on the land, it must be alleged in the petition that a lien was reserved on the land for the unpaid purchase price.

APPEAL FROM McCLEAN CIRCUIT COURT.

November 8, 1871.

OPINION BY JUDGE PETERS:

It is not alleged in the petition that a lien was reserved on the land for the unpaid purchase price by stating in the assignment of the title bond of Jett by Hendrix to Dossett the amount of purchase money which remained unpaid, which is necessary, as was decided by this court in *Taylor v. Ford, etc.*, 1 Bush 44, in order to entitle the holder of a note for purchase money to a lien on the land.

Nor does the evidence establish a fraudulent combination, etc., between Jett & Dossett in making the conveyance for the land without a reservation of a lien.

Wherefore the judgment must be affirmed.

Boyd, for appellant.

Bicker, for appellee.

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WM. PRESTON v. SALLY H. WOOLLY.

Wills—Devise of Land Held Adversely to Devisor.

Under the law of this state lands in adverse possession may be disposed of by will. By the common law a mere right of entry could not be devised, but by our statute any right or interest in real estate, that the testator may be entitled to, at the time of his death, which would otherwise descend to his heirs, may be disposed of by will.

APPEAL FROM LOUISVILLE CHANCERY.

December 7, 1871.

OPINION BY JUDGE LINDSAY:

We are of the opinion that such interest as was owned in the Big Field or Wells' land by the testator, Robert Wickliffe, deceased, passed under his will to the appellee, Mrs. Sally Howard Woolly. After devising to his two daughters, Mrs. Mary Preston and Mrs. Margaret W. Preston, certain named land in the county of Bath, he continues: "All the rest and residue of my lands in said county of Bath I give and bequeath to my daughter, Sally Woolly. She is to take Fears farm, consisting of about four hundred or five hundred acres, at twelve thousand dollars (\$12,000), and the balance of the lands I hold in the counties of Bath and Morgan I will to my daughter Sally at seventy-five cents per acre." It is difficult to conceive what language could have been used which would more clearly have evinced the intention of the testator that Mrs. Woolly should take under his will all the real estate owned by him in these two counties except such as was in terms set apart to the two Mrs. Prestons. The fact that in the latter part of the devise, in fixing the amount with which Mrs. Woolly was to be charged in the settlement of his estate, the testator used the term "hold," does not confine its operation to such lands as were then in his actual possession. In the second codicil to his will any ambiguity upon this point is fully explained. It is therein directed that there shall be no valuation of the lands devised to his three daughters, and in confirmation of the original devise of the Bath and Morgan lands to Mrs. Woolly, this language is used: "Sixth. I do hereby devise to my daughter, Sally Howard Woolly, my farm known as the Maria Forge farm, containing

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about four hundred acres, and my other Bath and Morgan out lands, excepting the lands devised to my daughter Mary, for the more particular description of which *I refer to my former codicil.*" The fact that a portion of the lands given to appellee were, in the language of the testator, "out land," rebuts the presumption that he intended her to take only such lands as he actually held and occupied; all conclude that he intended her to take all lands in those counties to which he held title except such as were given to Mrs. Mary and Mrs. Margaret Preston.

Nor are we prepared to decide that the devise to Mrs. Woolly is not specific enough to embrace the Big Field farm because it was, at time of the publication of the two codicils to the testator's will, in the adverse possession of Wells. The testator was all the while prosecuting a suit for its recovery, and if that land failed to pass because not specifically named, the same reason would prevent the appellee from taking the outlands, because they are not described and designated in any manner whatever.

Under the laws of this state lands in adverse possession may be disposed of by will. It is insisted, however, that such lands will not pass unless it is manifest from the will that such was the intention of the testator.

By the common law a mere "right of entry" could not be devised, but by our statute any right or interest in real estate that the testator may be entitled to at the time of his death which would otherwise descend to his heirs, may be disposed of by will.

Sec. 2, Chap. 106, R. Statutes. Whether or not the right to the possession of lands adversely held and claimed is an interest in, or right to real estate so peculiar in its character, that a different and more rigid rule of construction should be adhered to in ascertaining the intention of the testator with relation thereto, than his intention as to other interests in realty, we do not deem it essential to determine.

That the testator intended that his three daughters should take under his will all his real estate in the counties of Bath and Morgan cannot be doubted, "All the rest and residue of my land in the said county of Bath," and "the balance of the lands I hold in the counties of Bath and Morgan," and "my other Bath and Morgan county out-lands, * * * for more partic-

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ular description of which I refer to my former codicil," are terms of description comprehensive enough to embrace every character of lands, or interests therein, which the testator owned in those counties. In the case of *Allan and Wife v. Van Meters' Devisees*, 1st Metcalfe 264: The provision that "the whole balance of my estate is to be sold by my executors and divided among all my sons after my debts are paid and the legacy to my wife," was held to pass over six hundred acres of valuable land besides numerous slaves, none of which had ever been in the actual possession of the testator, but was held and claimed by others. More than this, it may fairly be inferred from the opinion of the court that the testator did not at any time know that he owned this estate. It is true that this clause was residuary, but the effect of it was to exclude the testator's daughters from all participation in the proceeds of this valuable estate. Adhering to the principles upon which this decision was based, we conclude that Mrs. Woolly took under her father's will such interest as he owned in the land in question, and therefore that the executors cannot claim the proceeds arising from the sale to Wells under the residuary clause of said will. Neither can they claim such proceeds under the clause authorizing them to compromise suits touching the testator's estate. It is not to be presumed the testator intended this power to be exercised as to deprive his devisees of property specifically devised to them. The chancellor of the Louisville Chancery Court had jurisdiction of this cause. It is not an action to compel the appellant to pay over and account to appellee for the proceeds of the sale of her land, which money he holds, not as executor of Robt. Wickliffe, deceased, but as an individual. Appellant is not sued as executor, nor does the fact that the construction of Wickliffe's will was necessary to determine the rights of the parties does not change the character of the litigation and make it a suit for the construction of said will, and a partial settlement and distribution of the testator's estate. The petition contains much redundant matter, which doubtless would have been stricken out upon motion, but as it set out a cause of action the demurrer was properly overruled. The money sued for is in the hands of appellant. It was, therefore, no error to render judgment against him, without waiting to get the other defendants before the court.

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Mrs. Woolly is entitled to interest on her money from the time the appellant refused to pay it over to her.

From that time forward, he had notice of her claim and held it to her prejudice and without right.

Johnson & Brown, for appellant.

Muir & Bijur, for appellee.

JOHN T. ROBINSON *v.* J. T. NORTH.

Judgments—Amount Claimed in Petition—Recovery in Excess of—Must be Reversed.

Where the judgment exceeds the amount laid in the petition it will be reversed and remanded with directions to render judgment for the plaintiff in the court below for the amount laid in the petition, where that is the only error; but where there is ground to apprehended from irregularity on the trial that justice has not been done, the cause will be remanded for a new trial.

Trial—All the Pleading Must be Given Jury When They Retire to Make Verdict.

Appellant had a right to have his answer to the petitions submitted, with them, to the jury; and while it does not appear that the verdict resulted from the withholding his pleadings, still his right to have them before the jury was invaded, and injury may have resulted therefrom and a fair trial prevented.

APPEAL FROM GALLATIN CIRCUIT COURT.

January 9, 1872.

OPINION BY JUDGE PETERS:

The damages in the original petition are laid at \$700 and in an amended petition they are laid at \$591.33. On the trial the jury found for the plaintiff \$759.91 in damages, with interest from the date of the finding, and a judgment was rendered against appellant for the sum found by the jury.

This is an error as has been repeatedly held by this court for which the judgment must be reversed.

It has been the general practice of this court where the judgment exceeds the amount laid in the petition and writ, to reverse the judgment and remand the cause with directions to render judgment for the plaintiff in the court below for the amount

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laid in the petition where that is the only error. But where there is ground to apprehend from irregularity on the trial that entire justice has not been done, this court will remand the cause for a new trial. *Suttles & Sublett vs. Whitlock*, 4 Mon. 452.

In this case it appears that when the jury retired to consider their verdict, one of the attorneys for appellee withdrew from the bundle of papers all the pleadings of appellant and handed to them the original petition, and an amended one which had been filed the 17th of September, 1867, and which at the March term, 1868, had been withdrawn, and some of the written evidence of appellee and the other papers in the case the attorney had not returned to the clerk, but had laid them away where they remained until after the verdict was returned.

Appellant had a right to have his answer to the petitions submitted with them to the jury, and, while it does not appear that the verdict resulted from the withholding his pleadings, still his right to have them before the jury was invaded, and injury may have resulted therefrom and a fair trial prevented.

Moreover, while it was the duty of appellant when Brown gave his evidence on the trial by which he was surprised, then to have moved the court to set aside the hearing and to postpone the trial or to continue the cause until he could procure the attendance of Frank, and if the refusal of the court to award a new trial on that ground were the only objection to the judgment this court would not reverse for that. Still, as the judgment must be reversed, for the error first named, we deem it proper to remand the cause with directions to grant a new trial and for further proceedings consistent herewith; the Chief Justice not sitting.

Winslow, for appellant.

Landrum, Scott, for appellee.

C. S. RANKIN & CO. v. J. Q. CHENERWORTH.

Account, Action on—Receipts and Notes—Prima Facie Evidence—Burden of Proof—Instructions.

The receipts and notes exhibited by appellee were prima facie evidence of a full settlement of accounts between the parties, up to the date of those papers, and the burden of proof was on ap-

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pellant to rebut the legal presumption arising from the execution and acceptance of those papers, but it was error to say to the jury, that unless they were satisfied that said papers were not executed in full discharge of the accounts, the law was for appellant.

Limitation—Merchant's Accounts—Instructions.

The jury may have believed that appellants were merchants, and also that they were manufacturers and sold the window caps as manufacturers and not as merchants. The instruction should have been made complete by saying to them that if they believe these facts from the evidence, the plea of the statute of limitation was unavailing.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 8, 1872.

OPINION BY JUDGE LINDSAY:

The instructions asked for by appellant and refused by the court were not only unnecessarily elaborate but complicated to such an extent as to be misleading. They were therefore properly refused. The first instruction given on the motion of appellee's is erroneous. The receipt and note exhibited by appellees were prima facie evidence of a full settlement of accounts between the parties up to the date of those papers, and the burden of proof was on appellant to rebut the legal presumption, arising from the execution and acceptance of those papers, but it was error to say to the jury that unless they were satisfied, said papers were not executed in full discharge of the account, or believed from the evidence that when the receipt was executed the parties were ignorant that the item for window caps had been omitted from the account, they should find for appellee. These papers certainly were executed in full discharge of the account, but if they were so executed through mistake, and the jury believed from the evidence that such was the case, then the law was for the appellants.

Nor was it necessary that both parties should have been ignorant of the omission of the item for window caps, at the time of the settlement. If appellants acted through mistake, that was sufficient to authorize a recovery, although appellee may have been apprised of the omission at the time.

Instruction No. 2 is also erroneous. By it the jury are told

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that if appellants were merchants and sold the goods sued for as merchants the plea of limitation must be held as a bar to a recovery. So far it is proper, but the court continues, "If they believe from the evidence that the plaintiffs were not merchants at the time of the execution of the debt, then the plea of the statute was unavailing to prevent a recovery. Now the jury may have believed that appellants were merchants, and also that they were manufacturers and sold the window caps as manufacturers and not as merchants," and the instruction should have been made complete, by saying to them that if they believed these facts from the evidence the plea was also unavailing.

The third instruction is liable to the same objection. Appellants may have been merchants, and the window caps may have been furnished upon a written order, and still they may have been so furnished by appellants as manufacturers, and not as merchants; for these reasons these instructions were misleading.

Judgment reversed and the cause remanded for a new trial upon principles consistent with this opinion.

Gibbons & Falconer, for appellants.

JAS. C. RUDD & MONARCH v. RICH H. RUDD, TRUSTEE, & TAYLOR, ETC.

Trust—Sult by Trustee to Collect Debts—Plea that Trustee Will Betray Trust not Sufficient.

A trustee cannot execute his trust until he gets into his hands the money due him as trustee and the pleas that he will then betray the confidence reposed in him by his cestui que trust is not a sufficient reason why a debtor shall refuse to pay what he owes to the trustee.

Consolidation of Causes—Notice of Facts Disclosed.

It does not appear from the pleadings or proof in the case of Rudd, trustee, etc., that the infant owns any part of the land in question, but this fact appears in the suit of Parker v. Cromie, and as the two suits are consolidated, notice of all the facts disclose in that case, must be taken.

APPEAL FROM DAVIESS CIRCUIT COURT.

February 26, 1872

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OPINION BY JUDGE LINDSAY:

The court did not err to the prejudice of appellant, J. C. Rudd, in striking out as surplusage all that part of his answer attempting to present a defense to the recovery on the note for \$3,000. The facts relied on might have authorized the court to award a rule against the attorney of the appellees, requiring him to show by what authority he prosecuted the action, but no such rule was asked for.

The trustee cannot execute his trust until he gets into his hands the amount due to him from appellant, J. C. Rudd, and the pleas of the latter that he will then betray the confidence reposed in him by his cestui que trust, is not a sufficient reason why the debtor shall refuse to pay what he owes to the trustee, when the beneficiary is in court asking that he be compelled to do so.

The judgment enforcing the lien directs the entire tract of 29 acres to be sold in case it proves necessary to sell it in order to satisfy appellees debts against J. C. Rudd. It is true that the commissioner is not to sell the six acres conveyed to Monarch and wife if the residue of the tract will satisfy the judgment, but it is impossible to determine in advance whether or not it will be necessary to sell all or any portion of these six acres.

It seems to us that before any part of Monarch's land was subjected to sale, the infant, Wm. Monarch, who owns an interest therein as heir at law of his deceased mother, should have been made a party defendant to the suit of Rudd and Taylor, ex'tx. Under the judgment in their favor, the purchaser at the commissioner's sale will not acquire title to the interest of such infant. It is true the title to this land is no longer in the appellant, J. C. Rudd, but a sale of it will necessitate a rescission of his contract of sale to Monarch and wife, and if he is to lose the benefit of that sale and be compelled to take back the six acres of land he is interested in, its selling for its full value. It is manifest that the defective title directed to be sold under the judgment in this case, will prevent purchasers from paying for it anything like what it is worth.

It does not appear from the pleadings or proof in the case of Rudd, Trustee, etc., that this infant owns any part of the land in question, but this fact appears in the suit of Parker & Cromie,

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and as the two suits are consolidated, notice must be taken of all the facts disclosed in that case.

If the land to which J. C. Rudd's estate holds title was to be sold first, and then so much of the Monarch land as might be necessary to pay such balance of the judgment, as should remain unsatisfied, the error in question would not make it necessary to reverse the judgment enforcing the lien, except in so far as it relates to the Monarch land, but the judgment does not authorize the commissioner to sell Rudd's portion of the land separately and apart from Monarch's unless it will pay the entire amount due on the judgment in which case of course the Monarch land would not be sold at all.

For these reasons we are constrained to reverse the judgment in so far as it directs the sale of the twenty-nine acres of land. The cause is remanded for further proceedings consistent with this opinion.

W. P. D. Bush v. T. Moore, for appellants.

Williams, for appellee.

PRESIDING JUDGE OF WASHINGTON COUNTY COURT v. THE CUMBERLAND & OHIO RAILROAD COMPANY.

Mandamus—County Court—Subscription for Capital Stock of Railroad—Election.

The county court had the right upon its own motion to submit the question to the voters of the county. The election ordered was held in pursuance to the provisions of the act of incorporation, and cannot be treated as void by reason of the assurances or representations made to the voters by friends of the enterprise. When a majority of the voters pronounced in favor of the proposition, nothing remained to be done by the county judge except to subscribe for the stock. In doing this he acts as a ministerial and not a judicial officer and can be compelled to discharge the duty imposed on him by a writ of mandamus.

Pleadings—Conclusions of Law—Facts Must be Stated.

The averment, that the provisions of the constitution were not complied with by the General Assembly upon its final passage of the act of incorporation is a mere conclusion of law, set up by the pleader. The facts from which the conclusions of law are drawn, and not the conclusions themselves must be pleaded.

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APPEAL FROM WASHINGTON CIRCUIT COURT.

February 28, 1872.

OPINION BY JUDGE LINDSAY:

This is an appeal from the judgment of the court below awarding a mandamus to compel the judge of the Washington county court to subscribe, for, and in behalf of said county. The sum of four hundred thousand dollars to the capital stock of the Cumberland and Ohio Railroad Company, and to issue bonds of the county in payment of such subscription.

Demurrers were sustained to each of the paragraphs of the elaborate answer of appellant, except the second, and the matters of defense therein set up were, upon hearing, held to be unsustained by the evidence before the court.

These defenses were technical in their nature, and as we concur with the circuit judge in his opinion that the facts relied on were not established by the proof, it will be only necessary to notice the questions of law involved.

We regard it a matter of no consequence whether or not the commissioners named in the act of incorporation, under which the appellee seeks to enforce the subscription of stock, had the right, before the organization of the company, to solicit subscriptions from such counties as were or might be authorized to subscribe for stock. The county court had the right upon its own motion to submit the question to the votes of the county. The election ordered was held in pursuance to the provisions of the act of incorporation and cannot be treated as void by reason of assurances or representations made to voters by friends of the enterprise as to the proposed location of the road. There representations amounted to no more than expression of opinion upon which voters had no right to rely. As settled by this court in the recent case of *Shelby County Court vs. This Appellee*, the vote was properly taken before the subscription was made. The result of the vote made mandatory as to Washington county, a law, which thereupon had been permissive. The agency to which the legislature delegated the discretionary power of determining when and to what extent, if at all, that county should subscribe to the capital stock of the Cumberland and Ohio Railroad Com-

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pany, determined that question when a majority of the qualified votes pronounced in favor of the proposition submitted by the county court, the law at once became final and peremptory. *Slack v. M. & S. R. Co.*, 13 B. Monroe, 1. Nothing remained to be done by the judge of the county court except to carry into execution the provisions of a perfect and mandatory statute. In doing this he acts as a ministerial and not as a judicial officer, and can be compelled to discharge the duties imposed upon him by the act in question.

Passing over various objections raised as to the proceedings had in the circuit court, to which appellant attaches but little importance, and none of which in our opinion can be made available for a reversal of the judgment of the court.

We proceed to consider the propriety of the order sustaining the special demurrer to the first paragraph of the appellant's answer.

It is alleged in said paragraph that the act incorporating the Cumberland and Ohio Railroad Company is unconstitutional and void because it is in conflict with section 14, article 13, of a state constitution, and because the provisions of section 40, article 2, of said constitution were not complied with by the general assembly when said act was attempted to be passed.

The first objection has been so often settled adversely to the position assumed by appellant that his counsel do not insist upon its consideration, and therefore we will not discuss it. The averment, that the provision of article 2, section 40, were not complied with by the general assembly upon its final passage of the act of incorporation is a mere conclusion of law, set up by the pleaders. He utterly fails to state what the acts of omission were, or in what particular the general assembly failed to comply with the provisions of the section in question. There is no rule of pleading better settled than that the facts from which the conclusions of law are drawn, and not the conclusions themselves must be pleaded.

In view of this defect of pleading it is not necessary that this court should express an opinion as to whether or not the provisions of this section of the state constitution apply to acts or resolutions creating debts against counties, cities, towns and

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other subordinate municipal corporations for the payment of subscriptions of stock to works of internal improvements.

The circuit court properly sustained the demurrer to the paragraph under consideration.

The judgment of the court below awarding the writ of mandamus must be affirmed.

P. B. & J. B. Thompson, for appellant.

Knott, for appellee.

VALETINE BABBITT *v.* COMMONWEALTH OF KY.

Criminal Law—Circumstantial Evidence—Measurement of Tracks.

It was competent for the commonwealth to prove by any means within its power the size of the tracks found in the field, the size of the boots worn by the accused, and any fact which tended to show the correspondence in the size between the tracks and the boots, and it was for the jury to determine the value of such proof when made.

Criminal Law—Dying Declaration—Written Statement Must be Read to Dying Man—Oral Proof Competent.

The written statement made out and signed by Gaar and Shardine, was not in any sense the statement of the deceased. It was not in the shape of a deposition, nor was it a statement signed by the deceased, nor is it proven that it was read over to the dying man and adopted by him as his version of the tragedy. Oral proof of a dying declaration is competent.

Criminal Law—Express Malice—Instruction.

"Express malice is such as is discovered by external circumstances, such as lying in wait for the deceased, previous threats or former grudges."

There is no proof tending directly to show that the accused had been lying in wait for the deceased or that he entertained toward him feelings of hostility, but it was proved that the deceased had been attacked in the night time, about a week before his assassination, and it was possible for the jury, when considering this fact, in connection with what occurred at the house of Wels, on the night of the killing to conclude that the accused was the assailant, on both occasions.

APPEAL FROM JEFFERSON CIRCUIT COURT.

March 26, 1872.

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OPINION BY JUDGE LINDSAY:

This appeal presents but three questions which can be considered by this court.

1st. As to the action of the circuit judge in refusing to exclude from the consideration of the jury the testimony relating to the tracks found in the field in which Jacob Rieu was shot and killed.

2d. In refusing to exclude all testimony relating to the dying declarations of said Rieu, and

3d. In giving instructions asked for by the attorney for the Commonwealth. These questions will be discussed in the order stated.

The tracks were measured with a strip of paper, which was afterwards applied to the boots of the accused by one of the witnesses and by this means it was ascertained that the tracks and the bottom of the boots were of the same size, or rather that the width was precisely the same and that the length of the tracks was a trifle greater than the length of the boots.

In a case like this, involving consequences so momentous to the accused, it would certainly have been much more satisfactory if the rule indicated by Mr. Burrill in his work on Circumstantial Evidence had been followed. It is apparent that if the boot of the accused had been taken and new impressions made therewith close to the original track and an exact correspondence been found to exist between the two impressions, such a fact would have tended much more strongly to show that the original tracks were made by the accused, than does the method adopted in this case. But we cannot concur with counsel that an actual comparison is essential in all cases, and that no proof as to the similarity in the size of the track and the shoe or boot of the accused can be heard, unless such comparison has been made. It is true that Bunnell seems to intimate that such is the rule, but we conceive that he intended thereby to convey the idea that such a comparison is essential, not to make competent, but to impart value or weight to the testimony.

It was competent for the commonwealth to prove by any means within its power the size of the tracks found in the field, the size of the boot worn by the accused, and any fact which

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tended to show the correspondence in size between the tracks and the boots, and it was for the jury to determine the value of such proof when made.

The failure of the Commonwealth to produce to the jury the proper measure of the tracks made and used by Willis and Webber did not render their statements touching the size of the same, and the statement of Webber as to the result of the application of the paper to the boots of the accused, incompetent. The production of the paper by corroborating these statements would have given them additional weight, or by failing to corroborate them might have impaired their value, but its production or non-production could not affect the admissibility or relevancy of the testimony.

It is also to be observed that the accused did not ask for the production of the paper, although Webber, who last had it in possession, was in court and examined as a witness.

The court did not err in refusing to exclude the oral proof as to the dying declaration of Rieu.

The written statement made out and signed by Esquires Gaar and Shardine, was not in any sense the statement of the deceased.

It was not in the shape of a deposition, nor was it a statement signed by the deceased, nor is it proved that it was read over to the dying man and adopted by him as his version of the tragedy so far as it appears from the record before us. Rieu did not know what the contents of the paper were. It may be possible that such facts could have been shown to exist, as under the common law rule of evidence, would have made this writing competent, and being competent that it would have been the best testimony as to what the dying declarations of the deceased were.

But from all that can be gathered from the record the paper in question was nothing more than a statement or memorandum made out by the two justices and never read or explained to the deceased.

We are not aware that the rule has ever been extended so far as to admit as competent against a person charged with homicide, a paper purporting to contain the dying declarations of the deceased, until it was first shown that the party making such declarations was acquainted with the contents of the paper, and in some way ratified or adopted them.

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Waiving any expression of opinion upon the constitutional question raised by the attorney general as to the admissibility in any case of written statements against parties being tried for criminal offenses, in as much as it does not appear that the paper in question could, under the common law rule, have gone to the jury as evidence, we cannot decide that the circuit judge erred in admitting the oral testimony as to the dying declarations of the murdered man. We are of the opinion that it was sufficiently proved that Rieu believed himself to be *in ex tremis* on Sunday night, when he made statements as to who it was that shot him, to authorize the court to permit proof of these statements to go to the jury.

Weis swears that he said he would never get over the wound, and Elizabeth Wirty, that he said he was going to die right away. The instruction complained of is in these words, "Express malice is such as is discovered by external circumstances, such as lying in wait for the deceased, or previous threats or former grudes." It is insisted that there was no evidence to authorize the giving of this instruction, and hence that it was calculated to mislead the jury.

It is true that there is no proof tending directly to show that the accused had been lying in wait for the deceased or that he entertained towards him feelings of hostility, but it is proved that the deceased had been attacked in the night time, about a week before his assassination, and it was possible for the jury, when considering this fact in connection with the proof of what occurred at the house of Weis on the night of the killing, and of the declarations of Rieu after he was shot to conclude that the accused was the assailant on both occasions, and that his attacks were prompted by ill feelings or hatred, and as we cannot determine that the jury were unauthorized to make the deduction suggested. From the facts proved, we do not feel that we would be warranted in holding that the instruction was wholly abstract.

Perceiving no error in the proceedings had in the court below upon the trial of this prosecution authorizing the interference of this court, we cannot reverse its judgment.

Judgment affirmed.

Seymour & Abbott, for appellant.

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JOHN W. HAZELRIGG v. JAS. G. TRIMBLE.

Bills and Notes—Assignment—Notice of Lien.

Taking the last note with notice of the agreement between Trimble and Stamper, Hazelrigg has no right to complain that Trimble's lien was adjudged superior to his.

APPEAL FROM MORGAN CIRCUIT COURT.

October 12, 1871.

OPINION BY JUDGE LINDSAY:

The testimony leaves no doubt but that it was agreed between Stamper and Trimble, at the time the purchase money note of Toliver was assigned to the latter in satisfaction of his mortgage debt, that said note was to hold and have a preference lien over the remaining part of the unpaid purchase price of the land sold to Toliver, and that this agreement formed part of the consideration, moving Trimble to release his mortgage liens.

This contract, although not reduced to writing, was binding upon Stamper.

We are very well satisfied that Hazelrigg had full notice of the agreement when he purchased the last note due to Stamper from Toliver.

The depositions of H. H. Stamper and of Tutt prove this notice beyond doubt, and though they afterwards testify that they were mistaken as to the fact when their first depositions were given, they assign no reason for such mistake. Possibly if they were unsupported, their testimony should be disregarded as unworthy of credit, but all the circumstances in the case, including Hazelrigg's equivocal and unsatisfactory pleadings, and more especially the written contract between Stamper and himself, conduce to show that the testimony of H. H. Stamper and of Tutt when originally given was true.

Taking as he did the last note with notice of the agreement between Trimble and Stamper, Hazelrigg has no right to complain that Trimble's lien was adjudged superior to his.

Judgment affirmed.

Hazelrigg, Simpson, for appellant.

Cooper, for appellee.

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S. W. KENNER *v.* CHARLES W. MCINTYRE, ETC.**Sale—Execution of Note After Receipt of Goods—Plea of Fraud, too Late.**

The plea of fraud in the sale of goods cannot be made available, where the note was executed after the goods had been received and opened, and after the purchaser had acquired a full knowledge of all the facts connected with the transaction and had received and accepted the goods.

Libel and Slander—Pleadings—Answer—Counter-Claim—False Representation.

Special damages in a case like this can be recovered only where the false representations are made maliciously and with intent to injure, and it must appear that actual injury was thereby done. It is not enough to charge that a creditor is induced to sue and attach by reason of false and malicious representations, it must be alleged that the attachment was discharged on the hearing of the case.

APPEAL FROM FLEMING CIRCUIT COURT.

October 21, 1871.

OPINION BY JUDGE LINDSAY:

The plea of want of consideration for the execution of the note sued on is bad. The answer shows upon its face that it was given for goods, wares, etc., sold and delivered.

The plea of fraud in the sale of such goods can not now be made available as the note was executed after the goods had been received and opened, and after appellant had acquired a full knowledge of all the facts connected with the sale and had received and accepted the goods.

The charge that appellant had sustained special damages by reason of false and fraudulent representations made by appellees to their creditors in Cincinnati is not good as a counter claim for these reasons. Special damages in cases like that can be recovered only where the false representations are made maliciously and with the intent to injure. Possibly it is sufficiently alleged that appellees did act maliciously and did intend by their representations to injure the credit of appellant as a business man, but it does not appear that they were actually injured thereby. They claim that by reason of such representations their creditors were induced to sue them and to attach their property, but

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they do not allege that there were not good grounds for such attachments, nor that the same were not sustained when tried.

It is not enough to charge that a creditor is induced to sue and attach by reason of representations, which are alleged to be false and malicious, and then tacitly concede that in point of fact good grounds for the attachments existed, by failing to allege, upon trial, the orders were discharged.

Whilst it is a rule of practice that upon demurrer every material allegation in the pleading is to be taken as true, it is also true that the pleading is to be construed most strongly against the pleader.

If the attachments were discharged, that fact should have been stated in the answer. The failure to state it raises the presumption that they were sustained, and if such be the fact, the representations complained of, turned out to be true instead of false and fraudulent.

We regard the answer as amended as fatally defective.

Judgment affirmed.

Anderson & Given, for appellant.

Andrews, for appellees.

MARY F. JOHNSON v. JAS. H. LEACH'S ADM'R AND OTHERS.

Descent and Distribution—Unconditional Conveyance by Intestate to Husband Not an Advancement to Wife.

Although the grandfather of appellant saw proper to charge her as an advancement, with the tract of land he conveyed to her husband, yet inasmuch as the conveyance to the husband is unconditional upon its face and there being no agreement on the part of the husband to hold the land for the benefit of his wife, the advancement can not be charged to her.

Husband and Wife—Waiver of Right to Wife's Property—Trustee for Wife.

The husband has the right to make himself the absolute owner of his wife's property by reducing it to possession, but if he agrees to take and hold the same as trustee for his wife, he thereby waives that right.

Opinion of the Court.

Limitation—Express Trust—Trustee.

Neither the trustee nor his representative, can plead the statute of limitation as against the *cestui que trust* in cases of express trusts and more especially against the wife, when she has been all the while a *feme covert*, and the trustee her husband.

APPEAL FROM CALDWELL CIRCUIT COURT.

June 15, 1871.

OPINION BY JUDGE LINDSAY:

Although the grandfather of Mrs. Johnson saw proper to charge her as an advancement with the value of the tract of land he conveyed to her husband, and although he doubtless expected that she and her offspring would, as the wife and children of his vendee, be the recipients of his bounty, yet, inasmuch as the conveyance to the husband is unconditional upon its face, and there is no evidence in the record tending to establish any agreement that he would hold the title of said land in trust for his wife, we are constrained to conclude that the circuit court did not err in dismissing her cross-petition in so far as she ought to have the title of the land vested in her.

But we are of opinion that she was entitled to relief, on her cross-petition as to the amount received by her husband in the distribution of the estate of her said grandfather.

This amount she took as one of his heirs and distributees, and, whilst it is true that her husband had the right by reducing the same to possession to make himself the absolute owner of the proceeds arising from the sale of her interest in the lands and slaves descending to her, yet, inasmuch as he voluntarily agreed by the execution of the bond in the proceeding in which said lands and slaves were decreed to be sold, to take and hold the same as trustee for his wife, he thereby waived that right.

It may be true that the proceedings under which the sale was made were not had in exact conformity to the provision of the 86a chapter of the Revised Statutes, yet the property sold was the property of the wife, and unless sold by her consent, could never have been subjected to the payment of her husband's debts. The money arising from said sale was still her property whilst in the hands of the court and the chancellor had the right and

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possibly it was his duty to secure it to the wife before permitting it to pass into the hands of the husband.

At any rate the husband could waive his marital rights to said money and permit it to be settled upon the real owner.

The bond executed by him had this effect in law, and under that bond he received his wife's money. Such being the case he received and held it as her trustee, and she is entitled to collect the same (with legal interest from the time it was so received) from her husband's estate. Nor is she to be prejudiced because of the fact that the money was described in the bond as her "separate estate," when in law it was general estate.

She was in no wise responsible for this mis-description, and besides it is not, and cannot be pretended that the bond was not executed for the purpose of securing to her the balance due to her as an heir and distributee of her grandfather.

Upon the return of the case her claim in this account should be allowed as herein indicated, and should be held to be a preferred debt.

We do not deem it necessary to discuss the plea of limitation. It is a well settled principle that neither the trustee nor his representatives can plead limitation as against the *cestue que trust* in cases of express trusts and more especially in a case like this, when she has been all the while a *feme covert*, and the trustee her husband.

Mrs. Johnson sets up no claim to dower in the tract of land adjudged to be sold in the proceeding on account of other lands in which she was entitled to dower having been previously sold.

Hence, under her pleading, the court was not authorized to afford her relief on that ground. But for the reasons indicated the judgment is reversed and the cause remanded for further proceedings consistent with this opinion. Either party should be allowed to amend their pleadings and reasonable time for further preparation.

Dabney, for appellant.

Marble, for appellee.

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HENKING, ALLEMONG & CO. v. LOUISA P. HARRIS.

Bills and Notes—Promise to Pay After Discoverture—Evidence of.

In the conversation detailed by the witness, the appellee spoke of paying the debts and said they ought to be paid and that she was going to pay all her debts but did not say particularly that she was going to pay these debts.

Held, that such a conversation cannot be construed into a promise to pay notes, when she was then resisting the collection of the same by a legal defense.

APPEAL FROM BOYD CIRCUIT COURT.

October 25, 1871.

OPINION BY JUDGE LINDSAY:

The provision of the act of the general assembly, approved January 21, 1869, to the effect that the estate of Mrs. Harris should be liable for any debts she then owed, was intended to apply to such debts as she was then legally bound to pay, and not to such as she had already been exonerated from paying by the judgment of this court, or other competent judicial tribunal.

It is not necessary that we should determine whether or not the moral obligation resting upon appellee to pay the notes sued on in this action would have been sufficient consideration to support a promise to pay them made after she had become discoverture.

It is sufficient that in our opinion she has made no such promise so far as appears from the evidence presented by this record.

In the conversation detailed by the witness Shoemaker, she spoke of paying these debts; said they ought to be paid, and that she was going to pay all her debts, but the witness says expressly that she did not say particularly that she was going to pay these debts. Such a conversation cannot be construed into a promise to pay notes, the collection of which she was then resisting by the inter position into this case, of every available legal defense. The judgment of the circuit court, dismissing appellant's petition, is affirmed.

James, Jones, for appellant.

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JACOB HASLETT *v.* JACOB MARKER.**Specific Performance—Election to Perform or Rescind Contract.**

The plaintiff alleged in substance and effect that he had endeavored, in good faith, to clear the title of doubts as to its validity, but had found it impossible to do so; and these facts being confessed by the demurrer and failure to answer, the court properly required the defendant to elect.

APPEAL FROM LOUISVILLE CHANCERY.

June 19, 1871.

OPINION BY JUDGE HARDIN:

As we construe the agreement of 7th of September, 1866, between the parties, it did not contemplate or bind either party to wait an indefinite period for the purpose of ascertaining whether Marker could exhibit and convey a clear or good title to the property, but that he should, within a reasonable time, endeavor in good faith to do so, and until then the lease should continue.

This suit was brought more than two years after the date of the agreement to require the appellant to elect whether he would execute the contract or submit to a rescission; the plaintiff alleging in substance and effect that he had endeavored in good faith to clear the title of doubts as to its validity, but had found it utterly impossible to do so; and these facts being confessed by the demurrer and failure to answer, we are of the opinion that the court properly required the defendant to elect; and the subsequent action of the court and final judgment were as favorable to the appellant as he had a right to demand under the contract, and facts admitted by the pleadings.

Wherefore the judgment is affirmed.

Bodley & Simrall, for appellant.

Dembitz & Wehle, for appellee.

LOUISE A. HELM *v.* HUBBARD D. HELM, ETC.**Trial—Motion to Dismiss Without Prejudice After Submission—Discretion of the Court.**

In the exercise of a sound discretion a court may sustain a motion to dismiss without prejudice, but after the cause has been regularly heard and submitted to the court for its decision on the

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merits, the plaintiff cannot, as a matter of right, avoid the result of the trial by dismissing the cause without prejudice to another suit.

APPEAL FROM CAMPBELL CIRCUIT COURT.

June 20, 1871.

OPINION BY JUDGE HARDIN:

As to the decision of this case on the submission on its merits, it will suffice to say that we find the opinion of the circuit court to be accurate in its statements and deductions, and correct in its conclusion, and we can perceive no error in the refusal of the court to set aside the judgment on either application of the plaintiff's counsel, for unfairness or surprise in the submission of the case.

The only question requiring more particular notice is whether the court erred in refusing, on the motion of the plaintiff's counsel after the submission of the case, to allow the action to be discontinued, or dismissed without prejudice to a future action.

In the exercise of a sound discretion and with a view to the ends of justice, the court might, perhaps, have sustained the motion, but after the cause had been regularly heard and submitted to the court for its decision on the merits, the plaintiff could not, as a matter of right, avoid the result of the trial, by dismissing the cause without prejudice to another suit, for a relitigation of the same matter of controversy and there was no abuse of the discretion of the court in overruling this motion. Wherefore the judgment is affirmed.

FRED HAWKINS v. HENNIG & SPEED.

Judicial Sale—Partial Eviction Acceptance—Deed—Indemnity.

Where land is sold under a judgment and a deed of conveyance made, the purchaser, upon the discovery of the fact that some of the parties were not properly before the court, is entitled to indemnity against a partial eviction by the holders of the unconveyed title.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 16, 1871.

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OPINION BY JUDGE HARDIN :

If, as is insisted for the appellant, the judgment rendered 26th September, 1868, is erroneous, to the appellant's prejudice, it was subject to reversal by a direct appeal to this court, but however erroneous that judgment may have been, we are satisfied the newly discovered facts alleged and proved in this action, as grounds for a new trial, were properly adjudged to be insufficient for that purpose.

But, as it appears that the title of C. W. Parker was to some extent incomplete, some of the heirs of Samuel Parker never having conveyed their interest in the property, and the court could not perfect the title, even by adjudging a conveyance from C. W. Parker, as it attempted to do, in the original suit, and it being alleged by the appellant in his amended petition, and the fact not denied that the heirs and devisees of Margret Wilson were non residents of this state, so that the warranty in Mrs. Wilson's deed to the appellant was probably insufficient as a guaranty to the appellant against a partial eviction by the holders of the unconveyed title, the appellant was entitled to indemnity or relief of some kind, notwithstanding his acceptance of the deed of Mrs. Wilson, and the judgment for a conveyance, but that relief ought not, upon the facts disclosed in this case, to have been a rescission of the contract, while the judgment of September, 1868, remained unreversed, but the court should have directed an enquiry as to the proportional value of the interest unconveyed according to the contract, prove, and set it off against the same amount of the notes for part of the price in the hands of Hennig and Speed, and especially so as no offer was made to indemnify the appellant against the apprehended loss. (*Golden v. Maupin*, 2 J. J. Marshall 237; *Hatcher, etc., vs. Andrews, etc.*, 5 Bush 561.)

Wherefore the judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Harlan & Newman, for appellant.

Thomas Speed, for appellee.

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C. M. HOWARD *v.* F. HUNTER.**Pleadings—Withdrawal of Exhibit—Use on the Trial—Waiver.**

Although an exhibit is withdrawn and not refiled, if it is recognized and treated by both parties and the court as a legitimate part of the defense, without objections, the irregularity will be regarded as waived.

Evidence—Comparison of Handwriting—Competency.

It is a well established rule that the comparison of handwriting is not competent evidence.

APPEAL FROM ELLIOTT CIRCUIT COURT.

October 6, 1871.

OPINION BY JUDGE HARDIN:

Although so much of the answer as set up, the receipt for \$68.00 was withdrawn on the first of December, 1869, and was not afterwards refiled, as it clearly appears that on the final trial it was recognized and treated by both parties and the court as a legitimate part of the defense without objection, we must regard the irregularity as having been waived.

But the action of the court in admitting and using for the purposes of a comparison of hand writings the note of J. M. Elliott over the objection of the plaintiff and which was excepted to by him, is deemed erroneous. It is a well established rule that comparison of hand writing is not competent evidence. *Woodard vs. Spiller*, 1 Dana 180; *McAllister vs. McAllister*, 7 B. Monroe 269.

There are some exceptions to this general rule as shown in the cases just cited, but there is nothing in this case to bring it within those exceptions.

Wherefore the judgment is reversed and the cause remanded for a new trial consistent with this opinion.

Hannah, for appellant.

Botts, for appellee.

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A. B. JOHNS *v.* WM. O. WOODSON, ETC.

Executions—Sale Under—Title and Rights of Purchaser—Subsequent Litigation.

The rights of a purchaser at an execution sale become vested at the time it is made and they cannot be divested nor impaired by subsequent litigation between the plaintiff and defendant.

Executions—Sale Under—Encouragement to Purchaser—Estoppel.

Where the defendant recognizes the regularity of the judgment and surrenders to the sheriff in writing, the land sold in satisfaction of same; to this extent he encourages the purchaser and is therefore estopped to controvert his right to take and hold the estate.

APPEAL FROM PENDLETON CIRCUIT COURT.

June 9, 1871.

OPINION BY JUDGE LINDSAY:

It appears that the two judgments upon which the executions issued under which the 34 acres of land were levied upon and sold, were in full force at the time of said levy and sale, and that the application for a new trial in the Smith case was not made until long after Woodson's purchase.

Whatever rights Woodson acquired under his purchase become vested at the time it was made, and they could not be divested nor impaired by any subsequent litigation between Johns and Smith. At the time of this purchase, Johns recognized the regularity and validity of Smith's judgment, and actually surrendered to the sheriff in writing the land sold in satisfaction of the same.

To this extent he encouraged Woodson to purchase and he is therefore estopped from controverting the right of his representatives and heirs to take and hold such estate as he acquired under said purchase.

The judgment appealed from permits Johns to redeem, and is certainly as favorable to him as the facts presented by the record could possibly authorize.

If the amount adjudged against him by the court exceeds the aggregate of the two executions, the mistake is a mere clerical misprision which the lower court can correct upon motion from the record itself, and until said court refuses to make the correc-

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tion, such mistake cannot be made the ground of reversal in this court.

Judgment affirmed.

Lee, for appellant.

WALKER A. HOWARD *v.* SOL. MCCOLLUM.

Appeals and Errors—Former Decision—Amended Petition.

The former decision of the Court of Appeals must be regarded as final as to all questions involved in this controversy except such issues as are raised by the amended petition filed after the return of the case to the Chancery Court.

APPEAL FROM LOUISVILLE CHANCERY.

October 19, 1871.

OPINION BY JUDGE LINDSAY:

The former decision of this court must be regarded as final as to all questions involved in this controversy except such issues as are raised by the amended petition of appellee filed after the return of the cause to the chancery court.

Whether it was proper to make further enquiry as to the solvency of Howard is altogether immaterial, as the preponderance of the testimony taken after the cause was removed to the chancery court, fully rebuts the allegation of his insolvency.

We are of opinion that appellee failed to make out a state of case justifying the conclusion that the sale of the Union county land to him comes within the inhibitions of the Champerty laws.

It is not claimed that the land sold by Howard and wife to appellees was in the adverse possession of any one at the time the sale and the first conveyance was made. The evidence of Shiman and Bryant, both of whom are setting up claim to the land, is indefinite and unsatisfactory. They speak in general terms of claiming and holding to the boundaries of the William Bryant survey. But the testimony of Johnson and Buckman conclusively rebuts their claim to any actual possession of the particular tract allotted to Howard and wife in the petition made by the Union county court. Besides this if it be true that since 1866 Shiman has been in the actual possession of said land, it

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is utterly incomprehensible how his client McCollum should have remained in ignorance of that important fact, during all this litigation up to the return of the cause from this court, and the intimation that a disturbance of his possession, or an actual eviction would alone be sufficient to authorize the relief he was seeking.

The chancellor should have dismissed the appellee's petition. The judgment is reversed and the cause remanded with instructions that such action be taken.

Marshall & Clark, for appellants.

Mix, for appellee.

JOSEPH HACKETT v. FRANCIS SCHAD.**Landlord and Tenant—Lease—Assignment—Responsibility of Assignor.**

In the absence of a contract on the part of the assignor of a lease to be responsible for the title of the lessor, or to keep the assignee in possession of the premises during the continuance of the lease, no obligation on his part can be implied from the assignment of the lease. The only undertaking which the law will imply from the assignment of the lease is that the assignor will be responsible for the ability of the lessor and his representatives to respond in damage provided there is an eviction.

APPEAL FROM LOUISVILLE CHANCERY.

October 2, 1871.

OPINION BY JUDGE PETERS:

This case has heretofore been to this court, and the opinion then delivered is reported in 3 *Bush* 353, which is referred to as showing the contract out of which this controversy has arisen, and the principles then settled as applicable to the facts as presented by the record then before the court.

By mistake in the opinion referred to, Mrs. Johnson, the widow of the lessor, was treated as the owner of the estate in the remainder, when in fact her daughter, Mary E., was the owner thereof, and in an amended pleading making her a defendant the plaintiff below charges that while appellant was in the peaceful possession of the premises, under the law, assigned to him,

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he purchased the greater part of the leased premises from Miss Johnson, the owner of the fee without notice to him, or his consent and surrendered his lease. That the portion so purchased by appellant was then worth \$6,500, but that the owner sold it to him for the sum of \$4,000, and that a deduction of \$2,500 was made from the price and true value of the property to indemnify appellant and protect him from loss of the price he had paid and agreed to pay appellee for the lease, and for a surrender of the residue of the premises to her not included in her father's lease to appellee, and he then avers that he is willing to take the portion of the premises purchased by appellant of Miss Johnson at the same price he paid, and refund the \$1,000 he received from appellant when he made the assignment of the lease to him, and to surrender the note for the residue he was to receive and for which this suit was brought; or to rescind the contract of assignment on equitable terms if appellee would pass to him the benefit of the purchase from Miss Johnson.

This amendment was filed October 2, 1868, the mandate of this court having been entered the 11th of the July preceding. Subsequently Miss Johnson married R. W. Woolley, Esq., who was made a defendant to the suit and he and his wife filed their answer in which they admit and affirm the fact that a part of the leased premises were sold to appellant by Mrs. Woolley for \$2,500 less than the value of the property at the date of the sale, to protect him from loss on account of the assignment of the lease to him.

No answer to this amended pleading was filed by appellant, and the allegation that a part of the leased premises with the house was purchased by appellant for much less than their real value as a satisfaction by the owner in remainder for any failure of consideration and so on an adjustment of all claims to relief should be regarded as admitted.

On the trial of the cause after its return from this court, and after it had been transferred to the chancery court, judgment was again rendered against appellant for the sum claimed and he has again appealed.

There is no contract expressed, either written or verbal, on the part of appellee to be responsible for the title of the lessor, or to keep appellant in possession during the continuance of the

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lease. Nor can an obligation on him be implied from the assignment of the lease. The only undertaking which the law will imply from the assignment is that he will be responsible for the ability of Johnson, the lessor, and his representatives. And it is not even alleged that the estate of Johnson is insufficient, or that an effort has been made to fix a liability on his estate.

The doctrine as applicable to the assignments is too well established to require a citation of authorities at this day to sustain it, and a reference to numerous authorities to the point, which might be done, would manifest an effort at a show of much leaning.

Moreover in the deed from Mary E. Johnson to appellant which was filed in the cause after its return to the court below, it is recited in consideration of the quiet, peaceable and unobstructed surrender and delivery of the possession by appellant of so much of the ground with the appurtenances included in a lease made by Dr. J. C. Johnson to Francis Schad and which lease was assigned by said Schad to said Hackett on the 18th of October, 1868, as is not comprised in the premises conveyed to him and the further consideration of \$4,000 the conveyance was made to him. Thus showing that the surrender of a part of the leased premises formed a part of the consideration for the conveyance. And while there is considerable conflict in the parol proof as to whether the property conveyed was at the time worth more than \$4,000, still as the allegation that it was worth \$6,500, and that the conveyance for less than the real value of the property was intended by the parties as a satisfaction for the amount paid for the lease is not denied. Evidnce that the \$4,000 paid was the full value of the property cannot avail and especially as the allegation is to some extent sustained by the recital in the deed.

Judgment affirmed.

Caldwell, for appellant.

Muir & Bijou, Woolleys, for appellee.

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THE HARMONY SOCIETY v. CITY OF LOUISVILLE.

THE KENTUCKY CLUB v. THE SAME.

Municipal Corporations—Ordinances Must be Authorized by Charter—Specific Tax.

In the imposition of a specific tax the city authorities must pursue, strictly, the grant of power under which they act, and as uniformity and equality of taxation, whether it be general or local, is one of the fundamental principles of our system of government, that rule in no case should be disregarded.

APPEAL FROM LOUISVILLE CITY COURT.

June 23, 1871.

OPINION BY JUDGE LINDSAY:

The general council of the City of Louisville, by an ordinance approved July 23, 1870, ordained:

First: "That every club house and club room, and every place of resort generally known as such, wherein malt, fermented, vinous or spiritous liquors are sold by retail, within the City of Louisville shall pay a license of \$200 per annum. Provided that this ordinance shall not apply to any *religious*, charitable or literary institution, or association of any kind whatever, whether taxed otherwise or not."

Second: "Any person violating any of the provisions of this ordinance shall be fined for each offense not less than \$20, more than \$50. For a violation of this municipal regulation the "Harmony Society" and the "Kentucky Club," both chartered institutions were proceeded against in the Louisville city court, and from the judgments of that tribunal imposing in each prosecution a fine of twenty-five dollars, this joint appeal has been prosecuted. Section 96 of the charter of 1870 authorizes and requires the general council by ordinance to exact and annul license of not less than fifty nor more than one thousand dollars, from each club room in the city *in which malt, fermented, vinous, or spiritous liquors are sold by retail.*

In the imposition of this specific tax, the city authorities must pursue strictly the grant of power under which they act, and as uniformity and equality of taxation whether it be general or

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local, is one of the fundamental principles of our system of government, that rule should be in no case be disregarded.

The licenses if exacted at all, must be exacted from all club rooms, wherever malt, fermented, vinous or spiritous liquors are retailed, whether they are "*reigious, charitable or literary*" in their character. A different construction would, under the evidence in these cases, permit the "Harmony Society," which is a literary institution in some respects, but clearly a "club" in the guise of that terms as used in the city charter, to escape without paying the license, whilst the "Kentucky Club" would be required to pay the amount asked.

The general council has no power to make such a distinction.

All clubs, whether social, charitable, literary or *religious*, at the place of which malt, fermented, vinous or spiritous liquors are sold by retail, stand alike under the charter, and they must all be required to pay the same license.

The ordinance in question not being authorized by the city charter is void, and the prosecutions under it against the appellants should have been dismissed.

Wherefore the judgments appealed from are reversed and the causes remanded with instructions to dismiss the warrants.

Reid, Pertle & Caruth, for appellants.

Hagan, for appellee.

HAYNER & DUNLEVY v. ROBT. TEMPLEMAN.

Appearance—Filing Affidavit—Effect of.

The filing of the affidavit controverting the grounds of attachment had the legal effect of entering the appearance of the defendant for all purposes.

Judgments—Rendering of Before Cause Stands for Trial—Clerical Misprison.

It is a clerical misprison to render judgment before the cause stands for trial, but where no motion has been made in the lower court to correct the error, the Court of Appeals cannot reverse.

APPEAL FROM FLEMING CIRCUIT COURT.

September 6, 1871.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

The filing of the affidavit controverting the alleged grounds of attachment had the legal effect of entering the appearance of the appellants to the action, for all purposes, hence the judgment against them cannot be regarded or treated as void.

If erroneous at all, it is because it was rendered before the cause stood for trial. Whether or not it was error to give judgment at the same term at which appellants entered their appearance we do not deem it essential to decide.

At most it was but a clerical misprision, and though the judgment was excepted to, no motion has been made in the court below to correct the supposed misprision. This court therefore has no power to revise the action of the circuit court in the premises. Civil Code, Sec. 580. *Duncan v. Wickliffe*, 4 Metcalfe 120.

Judgment affirmed.

Cox, for appellants.

Anderson for appellee.

P. J. HONAKER v. MARGARET HONAKER, ETC.**Specific Performance—Purchase by Executory Contract—Marriage of Vendor and Vendee.**

The vendee purchased a tract of land by executory contract and thereafter united in marriage with the vendor, whereupon he instituted this suit to compel specific performance of the contract of sale.

Held, that appellant is entitled to a specific execution of his contract of purchase of the land.

Executors and Administrators—Power of Executrix Ceases Upon Marriage.

Upon the marriage of an executrix her power over the entire estate ceases. Being under the legal control of her husband, she in legal contemplation has no discretion or power independent of him.

APPEAL FROM HENRY CIRCUIT COURT.

September 9, 1871.

Opinion of the Court.

OPINION BY JUDGE PETERS:

By the will of Willis L. Botts, the title to his land vested in his widow M. A. Botts with full power to sell, dispose of or use as she might think best, and at her death, whatever of his estates was left to go to his son Douglas Botts if living, and if not, then to two of his brothers named. His widow was nominated in his will as his executrix, and being qualified, sold the land of testator to appellant by executory contract. Subsequently, he and the widow inter-married, and he then brought this suit in equity for a specific execution of his contract, and for a construction of the will, defining the powers and rights of the executrix and his rights as her husband.

One-fifth of the land, according to the allegations of the petition belonged to Mrs. Honaker by inheritance from her father, none of the purchase money was paid except \$165, which as appears appellant and his wife have paid on debts owing by testator, and after deducting the one-fifth of the price which was \$3,500, agreed to be paid for the whole tract to which the wife was entitled in her own right, and the \$165 paid on the debts of testator, the sum of \$2,635 of the purchase price remained unpaid.

The court below adjudged that appellant was entitled, under his executory contract to a conveyance of the land, and directed the Master to convey in the name of Margaret Honaker in her own right, and as executrix of her late husband the land as containing 517 acres, appellant consenting to take it at that quantity, retaining a lien on it to secure the payment of the purchase money without interest, and at the death of Mrs. Honaker, if her son Douglass should survive her, the court adjudged he would be entitled to the unpaid price, and in case of his death then to the other devisees in remainder named in the will. And of that judgment appellant complains.

There can be no question that appellant is entitled to a specific execution of his contract of purchaser of the land and it is equally clear that if his wife had remained a widow of testator that she might have used the estate as to her seemed best even to the consumption of the whole of it, but upon her marriage, her powers as executrix ceased, and being under the legal control of her husband, she, in legal contemplation, had no discretion or power

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independent of her husband, upon her marriage therefore her powers over the whole estate ceased.

It cannot be supposed that the testator intended to place his whole estate in the power of any other than his wife, who was the mother of his only offspring, a helpless and afflicted son, unable to make a support for himself, and leave him destitute of the means of a support. We, therefore, conclude that the case should be referred to the master to ascertain by proof what it will be reasonably worth per annum to take care of and support Douglass Botts, the son of testator in the country, and in the manner his father provided for him in his life time. And in the conveyance to be made for the land to appellant, a lien should be reserved on so much only as may be reasonably necessary for the support and maintenance of Douglass Botts in the manner and the expenditure for that purpose need not be confined to the interest on the unpaid price of the land, and it seems to us that after setting apart a sum for that purpose, no lien should be retained for the residue of the purchase money as one-fifth of the land belonged to the wife of appellant which she had a right to dispose of independent of the will, and the residue of the four-fifths after the payment of debts, and the support of Douglass Botts would not be more than she would be entitled to.

Douglass Botts was made a defendant to the petition but it does not appear that he was ever served with a summons and although an infant, no guardian ad litem was appointed for him. On the return of the cause he should be brought before the court by service of process, and a guardian ad litem appointed.

As therefore the judgment of the court below is not in accordance with the principles herewith stated, and is prejudicial to appellant the same is reversed and the cause is remanded for a judgement and further proceedings consistent herewith.

Mrs. Honaker should be by a commissioner appointed for the purpose, privily examined, as to the facts stated in her answer, and by her sworn to the same.

Pryor & Barbour, for appellant.

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ROBT. P. KENNEY v. PHILLIP KIDD, ETC.

Trusts—Resulting Trust—Self Constituted Trustee.

When Kenney applied the proceeds of the Giltner note to the payment of the individual debt due from P. H. Kidd to himself as executor of Mrs. Markee, knowing as he did that said note was owned by the infant Henry Kidd, he must be regarded as having thereby constituted himself, the trustee of the latter.

Guardian and Ward—Surety on Guardian's Bond May be Substituted to Rights of Infant.

Where a surety on a guardian's bond has been compelled to pay on default of his principal, he will in equity be substituted to all the rights and remedies of the ward, against the principle in the bond and the party who has the actual possession of the estate.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 28, 1871.

OPINION BY JUDGE LINDSAY:

When Kenney applied the proceeds of the Giltner note to the payment of the individual debt due from P. H. Kidd to himself as ex'or of Mrs. Markee, knowing as he did that said note was owned by the infant Henry Kidd, he must be regarded as having thereby constituted himself, the trustee for the latter.

The transaction between the guardian and the appellant did not have the effect of divesting the ward of his property in said note or its proceeds.

Kenney might possibly have relieved himself of his responsibility to the ward by returning the property to its proper custodian, the guardian, but there is nothing in the record tending to show that he ever did so. The subsequent transactions between the parties touching the sale of the estate of Mrs. Kidd, and the re-investment of its proceeds in the house and lot on Broadway, seems to have been made by Kenney in the discharge of his duties as trustee for Mrs. Kidd, having no reference whatever to the interests of Henry Kidd, and not intended at the time by either party, to operate so as to discharge Kenney from his obligation as a self-constituted trustee for the latter.

We think it clear that Henry Kidd had a cause of action against appellant for such amount as remained due him from his guardian on account of the Giltner note.

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He deemed proper, however, to proceed upon his guardian's bond and has recovered judgment for said amount against the surety on such bond. This surety was in no wise responsible for the transaction between Kenney and his principal, the guardian, and in case his estate is subjected to the payment of the ward's judgment his administratrix is in equity entitled to be substituted to all the rights and remedies of said ward, against both the principal in the bond and the party who has actual possession of the estate for which she is compelled to account.

This right of substitution, however, will not accrue until she satisfies said judgment and as it does not appear that she has done so it was erroneous to render the judgment in her favor against Kenney. The proper proceedings would have been to compel Kenney to pay the amount for which he is accountable into the court, and then to apply the same to the payment of Henry Kidd's judgment, or if said judgment has been paid by the administratrix of Samuel A. Kidd, to apply said amount to the satisfaction of her claim against Kenney.

But in view of the fact that the parties have filed an agreement admitting that appellee has satisfied the judgment in favor of Henry Kidd, and consenting that the judgment in her favor shall not be reversed upon the sole ground that this fact does not appear from the pleadings and proof in the case, said judgment is affirmed, but no judgment shall be rendered against appellants for the costs of this appeal.

Johnson, Beck & Carr, for appellant.

Hunt, for appellees.

W. P. HAHN & A. HARRIS V. BEN FIGG ET AL.

Highways—Special Interest—Common Interest—Nuisance—Who May Sue.

One having a common interest in a public highway, which belongs equally to all and in which the party suing has no special or peculiar property, he cannot maintain a suit. An obstruction would be a nuisance common to all.

Highways—Special Damages.

Where a party sustains special damages on account of the obstruction of a highway, the party thus injured may sue in his own name.

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APPEAL FROM LOUISVILLE CHANCERY.

September 9, 1871.

OPINION BY JUDGE PETERS:

At the threshold appellees are confronted with a difficulty which seems insurmountable. They do not show that they have any interest in this road which does not belong to every citizen in the community.

In *Barr & Yeiser v. Stevens, etc.*, 1 Bibb 292, it was decided by this court that upon general principles that common interest, which belongs equally to all and in which the parties suing have no special or peculiar property, they cannot maintain a suit.

If a public road or highway has been established over the lands of appellants, a question which is not now properly before us and which we have no authority to decide, and appellants put up fences or dug ditches across the same whereby passengers are prevented from the use of the road, such obstruction would be a nuisance common to all and for which they would be punishable at common law by indictment. If in attempting to pass said highway (if it be one) appellees or either of them had received special damage on account of said obstruction as by the fall of a passenger's horse or the upsetting of his carriage whereby an injury was sustained by wounding the passenger, or his horse or the breaking of his carriage, the party thus injured could maintain an action therefor in his own name. But the reason as given in the case, *supra*, why he cannot without special damages maintain an action against such wrongdoer is, that if one could sue, all might, which would be ruinous.

Appellees do not allege and have not shown that they have any exclusive interest in this road, or have sustained any special damage not common to others and, according to the authority cited, they cannot maintain this suit in their names. Wherefore the judgment must be reversed and the cause remanded for further proceedings consistent with this opinion.

A. Harris, Caldwell, for appellants.

Jas. Harlan, for appellee.

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THOS. P. HARGRAVES v. CHAS. D. POPE.

Boundaries—Courses in Deed Must Conform to Established Lines.

The last line of the lot according to the calls of the deed must run with the line of Pope street, which is known and recognized by the parties and is made the southern boundary of the lot. That being an established line the courses in the deed must be made to conform to that line.

APPEAL FROM LOUISVILLE CHANCERY.

September 15, 1871.

OPINION BY JUDGE PETERS:

It appears from the evidence of Henning, and a map of the ground filed in the papers that to begin at the intersection of Pope street with the Shelbyville and Louisville turnpike, and run thereon westwardly along the line and parallel with said pike seventy-five feet; thence northwestwardly at right angles with said turnpike seventy-five feet to the line of said Pope street; thence southwardly a straight line to the beginning, will deflect from the line of Pope street and from a right angle $2\frac{1}{2}$ degrees. But the last line of the lot, according to the calls of the deed, must run with the line of Pope street, which is known and recognized by the parties and is made the southern boundary of the lot, that being an established line the courses in the deed must be made to conform to that line. This is according to well established authority, and as the judgment only reformed the deed so as to make it conform in letter to its legal effect, appellant is not prejudiced.

Wherefore the judgment is affirmed.

Young & Harbeson, for appellant.

H. Pope, for appellee.

R. R. JONES v. S. E. JONES, ASSIGNEE, ETC.**Bills and Notes—Position of Name on Bill.**

With the evidence equipoised the fact that Holbrook is the payee and his name is just where it would be on the bill, first endorser, becomes important and must assert an influence in determining the liability of the parties.

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APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.**June 23, 1871.****OPINION BY JUDGE PETERS:**

The evidence in this case is conflicting and but for one controlling fact it would be difficult to conclude on which side the preponderance was; the fact alluded to is the position of the name of Holbrook on the bill.

It is true the witnesses differ in their statements as to when it was placed there. Holbrook says it was some thirty days after the bill was made and delivered to him; that he placed his name on it to enable Dean to present it to the bank and receive payment, and he is to some extent corroborated by Curran and others.

While Caldwell and Tuck state positively that Holbrook endorsed it before they did, Caldwell endorsing for Phelps, Caldwell & Co., and they are to some extent corroborated by Phelps. With the evidence thus equipoised the fact that Holbrook is the payee, and his name is just where it would be on the bill, first endorser, becomes important and must assert an influence in determining the liability of the parties. And in connection with that fact, we think the weight of the evidence sustains the conclusion of the court below, which, however, we would feel bound to sustain without that fact on the conflict which exists.

Wherefore the judgment is affirmed.

Bodley & Simrall, Barrett & Robert, for appellant.

Harrison, for appellee.

J. JACKSON v. C. PITMAN.**Bills and Notes—Assignment—Suit by Assignee—Instructions.**

The court substantially instructed the jury that they should find for the appellant unless they believed he had induced Pitman to trade for the note by conceding that it was a good debt and agreeing he would pay it.

APPEAL FROM LAUREL CIRCUIT COURT.**June 7, 1871.**

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

The court substantially instructed the jury that they should find for the appellant unless they believed he had induced Pitman to trade for the note by conceding that it was a good debt and agreeing that he would pay it. This seems to be in accord with the principle laid down in the cases of *Smith v. Stone*, 17 B. Monroe 171, and *McBrayer v. Collins*, 18 B. Monroe 838. Appellant was not prejudiced by the refusal of the court to allow him to file his cross petition against Bradley, the original payee of the note.

He had no right to delay Pitman whilst he was litigating with Bradley. The verdict of the jury is not so palpably against the evidence as to authorize this court to reverse the judgment because the court below refused to grant a new trial on that ground.

Judgment affirmed.

James, for appellant.

Pearl, for appellee.

JAMES H. KENDRICK ET AL. v. JNO. W. LEE.**Bills and Notes—Possession of Note—Presumptive Evidence.**

The possession of the note sued on is strong presumptive evidence that the alleged balance has not been paid. The execution of another note after the date of the one sued on strengthens this presumption.

APPEAL FROM FAYETTE CIRCUIT COURT.

September 28, 1871.

OPINION BY JUDGE LINDSAY:

The possession of the note upon which this action is founded is strong presumptive evidence that the alleged balance has not been paid. The fact that the credit was entered on the day of Kendrick's sale, tends to show that upon settlement of Lee's purchase and the money and note then received by him, the note was entitled to the credit given.

The execution of the ninety-seven-dollar-note afterwards strengthens the presumptions. No reason is shown why the

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note sued on was not taken up if paid off, either at the time of appellant's sale, or when the ninety-seven-dollar-note was executed.

The fact that this last note purports to be for rent may be accounted for upon the idea that the two was sold or not returned by Kendrick were then settled for.

His liability on that account grew out of the rent contract. It seems to us the judgment of the circuit court is sustained by a preponderance of the evidence. Judgment affirmed.

Prall, for appellant.

Harrison, Hunt, for appellee.

S. B. HOWARD'S ADMR. *v.* A. P. COOPER.

War—Confiscation of Property—Order of Superior Officer—Pressing Necessity.

Where property is taken under orders of a superior officer it must be valued by disinterested persons and the evidence of the taking, for the public service, with the evidence of its value must be given to the owner, so as to enable him to hold the government responsible for its value and there must be evidence of the pressing necessity for the taking.

APPEAL FROM MORGAN CIRCUIT COURT.

October 12, 1871.

OPINION BY JUDGE PETERS:

It appears from the evidence that the affidavit attached to the account made by appellee of the justness, etc., of the claim, and of his witness proving it, were sworn to before an officer of Magoffin county having authority to administer the oath in said county where it was administered, and the demand with the necessary affidavits before suit brought, was sufficiently proved.

If the mare was taken under orders of a superior officer of the Confederate army it was the duty of intestate to have had her valued by disinterested persons and the evidence of his having taken her for the public services with the evidence of her value given to the owner so as to enable him to hold the de facto government responsible for her value, this is not shown to have

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been done, and there is no evidence that there was any pressing necessity to take her, in the absence of which the taking was without excuse.

Nor do we think the court below erred in overruling the objections to R. L. Cooper's evidence. There was other evidence conducing to show that the mare had been taken by intestate, and witness testified to what the man said who was riding her, and the rational presumption would be that the intestate was the man who made the communication.

But the judgment must be reversed for another and altogether different reason.

The suit is brought against appellant as administrator for the taking and conversion of appellee's mare by the intestate and appellant can only be made responsible in his representative capacity. But a personal judgment was rendered against him which was erroneous. It should have been rendered against him for the amount found and costs to be levied on assets in his hands to be administered. *Botts' Admr. v. Fitzpatrick*, 5 B. Mon. 397.

For the foregoing error the judgment is reversed and the cause is remanded with directions to render judgment as herein indicated.

W. H. Holt, for appellant.

 S. B. HOWARD'S ADMR. v. A. P. COOPER.

War—Confiscation of Property—Taking for Public Use—Owner Retains Title Until Compensation is Made.

If personal property be taken by the government and be applied to public use, until just compensation be made, the owner, though deprived of the possession, against his will, yet retains the title, and the incidental right of recaption as a security for payment, unless in a reasonable time the value shall have been legally fixed and paid or offered, but the danger must be imminent and impending before the taking can be authorized.

OPINION BY JUDGE PETERS:

Counsel complain of the decision in this case as being novel and startling, and even seems to congratulate himself that the

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principles herein enunciated were withheld until so late a period apprehending that if they had been announced immediately after the close of the war they would have pauperized the confederate soldiers of the state.

That class of our citizens may congratulate themselves in having at last found so able a defender of their rights in the person of the attorney for appellant, and in his newly awakened zeal for them it may not be surprising that he should have forgotten, for he must have read the decisions that this court rendered as early as 1865. In the case of *Carbin v. Marsh*, 2 Duvall 193, announced the startling doctrine that if a horse, or slave, or house be taken by the government and be applied to public use, until just compensation be made, the owner, though deprived of the possession against his will, yet retains the title, and the incidental right of re-capture as a security for payment, unless in a reasonable time the value shall have been legally fixed and paid or offered. And in *Haight v. Morris*, 4 W. C. C. R., Justice Washington of the supreme court of the United States adjudged that until full indemnity is offered the party, the power of taking his property cannot be exercised, and chancery will grant an injunction to stay proceedings until indemnity. Justice Baldwin of the same court decided the same thing, and Chancellor Kent fully endorsed the same doctrine. 2 *J. Ch. R.* 162.

And in *Jones v. Commonwealth*, 1 Bush 34, this court held, under the authority of *Mitchell v. Harmony*, 13 How. 128, Supreme Court of the U. S., that a military officer charged with a particular duty may impress private property into the public service or take it for public use.

But in all such cases the danger must be imminent and impending, or the necessity urgent for the public service, such as will not admit of delay. It is the emergency that gives the right and the emergency must be shown to exist before the taking can be justified, and unless the party charged with the taking show the emergency he will be responsible. In *Rankin v. Tharp*, 2 Duvall 505, this court held that soldiers were liable for trespass committed in violation of the laws of war, though commanded by their superior officers to do the act. The same doctrine is enunciated but in stronger language by this court in *Ferguson v. Lear*. There this court said: Private property cannot be

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taken for public use without just compensation either in peace or war. In war, pressing emergency may authorize seizure before making or providing for compensation; but to excuse the taking without the owner's consent, the necessity must be apparent and instant leaving no legal and available alternative. These last words italicised. In that case the appellee was a confederate soldier sent under ——— by written command of General J. S. Williams to Kentucky to recruit ——— for the Confederate army, and the appellant who brought the suit was, when the mule was taken by appellee for which he sued a soldier in the Federal army. In *Farmer v. Lewis*, 1 Bush 66, the same doctrine is enunciated. In *Hoge v. Penn*, 3 Bush 663, after citing and approving the rulings of the court in the cases of the *Christian Co. v Rankin & Tharp*, 2 Duvall 502; *Terrill v. Rankin*, 2 Bush 453; *Mitchell v. Harmony*, *supra*, it is said an unlawful act cannot be justified by an unlawful command to do it.

The doctrine decided in the opinion complained of was announced as early as 1865 has been repeated, and the cases sustaining it reported in each book of reports from 2 Duvall to 6 Bush, the latest published book of reports of the court, without a conflicting opinion or dissent of a judge on the bench, and it is strange that counsel should become appalled at the doctrine at this late day, which can only be accounted for on the ground that his zeal for the confederate soldiers slept until they are all well nigh rescued from dangers, for what was done during the war by the quieting influences of time and the little time he has to work, must be inspiringly devoted to it.

"A regard for *stare decisis* compels" the court to overrule the petition for a rehearing.

Holt, for appellant.

HOGG & WIFE v. THURMAN, ETC.

Real Actions—Title Back to Common Source.

In an action to recover land it is not necessary for the plaintiff to show title back beyond the common source.

Opinion of the Court.

APPEAL FROM HANCOCK CIRCUIT COURT.

September 16, 1871.

OPINION BY JUDGE LINDSAY:

Appellees claim to be the owners of two undivided one-ninths of the one-hundred-acre tract of land in possession of appellants.

They claim to derive title from Mrs. Alice Jagers, deceased, and it is conceded that they and those under whom the claim are heirs at law of Mrs. Jagers.

Appellants derive title from Jacob Emmick, and from the evidence it appears that he acquired title by purchase from certain of the heirs of Mrs. Jagers.

The second amended petition charges that appellants were in possession of a tract of one hundred acres of land therein described.

This allegation is material; it was not denied and therefore stands admitted.

James Moran proves that appellants were in the possession of the Alice Jagers' land, and that he was informed by their ancestor, Jacob Emmick, that he acquired possession and title by purchase from certain heirs.

He does not name them as heirs of Alice Jagers, but the connection in which he was speaking leaves no doubt that but that it was her heirs to whom he referred.

The evidence of Goldsby Lawson is to the same effect.

While it is not demonstrated by an actual survey that the boundaries and abutments set out in the first amended petition embrace the Alice Jagers' land, the evidence strongly preponderates in favor of that conclusion.

We are of opinion, after a careful reading of the record, that both appellees and appellants claim title from a common source.

It was therefore unnecessary that appellees should show title except back to that source. This is conceded they have done.

Judgment affirmed.

Williams, for appellant.

Bush, for appellees.

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M. KANE ET AL. v. GEO. W. ADAMS ET AL.

Fraudulent Conveyance—Mortgage to Prefer Creditor—Assignment Under Act of 1856.

As the debts of the appellees existed before the execution of the mortgage, the allegation in the answer that appellants were about to attach the property of Kane and that the mortgage was given to prevent them from taking such proceedings to secure their debt was not sufficient, therefore the demurrer was properly sustained.

APPEAL FROM SHELBY CIRCUIT COURT.

September 8, 1871.

OPINION BY JUDGE LINDSAY:

The execution of the mortgage by Kane to his co-appellants not only evidenced an intention on his part to prefer the mortgagees to the rest of his creditors but actually had that effect unless the judgment of the circuit court shall be upheld.

The mortgagees in their answer claim that they were about to attach the property of Kane, and that the mortgage was given to prevent them from taking such proceedings to secure their debts. Kane was not a non-resident of the state, hence if there existed any ground for their contemplated attachments, it must have been of a nature indicating an intention upon his part to avoid the payment of his debts by some fraudulent disposition of his property. Such a disposition of property is always made in contemplation of insolvency.

The mortgagees recognizing this fact attempted to secure themselves by their mortgage. We are of the opinion that the state of facts developed by the record brings this case within the operation of the act of 1856, and hence that the demurrers to said answers were properly sustained. The petitions sufficiently allege that the debts of the appellees existed before the execution of the mortgage. The judgment appealed from is affirmed.

Caldwell & Harwood, for appellants.

Bullock & Davis, for appellees.

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R. C. JESSE v. T. G. DULIN AND WIFE.

Partnership—Denial of Existence—Reference to Master for Settlement.

In as much as the existence of the partnership was denied by appellant and his contention sustained by the court, there was no reason why the cause should have been referred to the master for a settlement of the accounts between the parties.

APPEAL FROM SHELBY CIRCUIT COURT.

September 11, 1871.

OPINION BY JUDGE LINDSAY:

Appellant concedes that the adjudication of the court as to the matters in litigation in the two actions originally begun in ordinary is substantially correct, but complains of the judgment in the suit brought for the settlement of the alleged partnership.

In as much as the existence of the partnership was denied, and as the court (as we think correctly) sustained appellants denial, there was no reason why the cause should have been referred to the master for a settlement of the account between the parties, and the failure to do so cannot be regarded as a ground of reversal.

The petition of appellee sets out that certain sums of money had been advanced by them to appellant, which the latter by his answer denied.

Upon hearing, the issues thus raised were settled by the judgment of the court, the question of partnership being first determined in appellant's favor.

In this settlement we perceive no error. The evidence leaves no doubt but that appellant received the money on the \$785 check, and we do not think he sustains his plea that he had the check cashed merely for the accommodation of Mrs. Dulin and paid the amount collected over to her at once.

Th evidence of young Jesse upon this point is not to be credited. It was impossible for him at the time his deposition was taken to have remembered the exact date of the transaction and the exact amount of the payment, he having made no memorandum and his attention not having been specially called to what was being done. Besides this it is altogether improbable that his father would have examined him as a witness without

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having first ascertained by inquiring what his testimony would be. The court below properly disregarded his evidence.

Conceiving the judgment of the circuit court to be substantially correct we do not feel authorized to disturb it.

Judgment affirmed on both original and cross-appeal.

Caldwell & Harwood, for appellant.

Bullock & Davis, for appellees.

ANDREW HARRIS v. E. H. FIELD'S EX'TX.

Vendor and Purchaser—Inability to Convey in Accordance With Title Bond—Rescission Irresistible.

The inability of Harris to convey in accordance with the stipulations of his title bond and the refusal of the chancellor in the exercise of his discretion in the premises, to sell the land of his infant children, rendered the rescission of the contract of sale irresistible.

Executors and Administrators—Will Invests Title and Power to Sell in Executor—Widow and Heirs Not Necessary Parties to Suit to Rescind Contract of Sale.

The will of Cockerill vested the title to all his real estate in his executors. Having this power in the exercise of their discretion to sell and convey, they also had the power out of court to rescind the contract with Harris; therefore the widow and heirs were not necessary parties.

Judicial Sales—Failure to Fix Time of Sale in Judgment.

The failure of the court in its judgment to fix the time and place of the sale of the land is not an available ground for a reversal; section 405 of the code which applies to the sales of real estate made in pursuance to judgments of courts of equity imposes no limitation of the power of the court.

APPEAL FROM ESTILL CIRCUIT COURT.

October 10, 1871.

OPINION BY JUDGE LINDSAY:

The inability of Harris to convey in accordance with the stipulations of his bond for title and the refusal of the chancellor in the exercise of his discretion in the premises to sell the lands of his infant children, rendered a rescission of the contract of sale irresistible.

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It satisfactorily appears that Cockerill paid \$2,500 of the purchase money on the land before his death, and that his executor afterwards paid the further sum of \$2,000.

The judgment in favor of the appellee for these amounts less reasonable rents was proper, and it was also proper to subject Harris' interest in the lands to the payment of such judgment.

We are of opinion that the widow and children of Simon Cockerill were not necessary parties to the proceedings.

The will of Cockerill vested the title to all his estate in his executors. They were authorized to sell all or any part of his lands and empowered to convey the same.

Having the power in the exercise of their discretion to sell and convey, they also had the power even out of court to rescind the contract with Harris.

The failure of the court in its judgment to fix the time and place of the sale of the land is not, in our opinion, an available ground for a reversal, if indeed it be an error at all.

Section 253, Civil Code, provides that real estate taken under attachment, when sold by order of court, shall be publicly sold, upon such notice and such time as the court may direct, but section 405, which applies to the sales of real estate made in pursuance to judgments of courts of equity imposes no such limitation upon the powers of such courts.

The amount allowed appellant in the way of rents is as much as the evidence authorized. The fact that the commissioner allowed Cockerill's executor \$45.00 for improvements did not necessarily require the chancellor to refuse to confirm his report.

While the judgment did not in terms require him to inquire into the value of improvements made by the Cockerills, yet in as much as they were being charged with rents, they were entitled to be paid for ameliorations. The commissioner reported the evidence and the allowance was, in fact, made by the chancellor and not by him.

The failure of the commissioner to advertise as generally as the judgment sees to require, does not of itself render the sale invalid. The only injury appellant could have sustained from such failure was the sale of his land at a sacrifice. Whilst there is more proof tending to show that the sale was for less than

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the value of the land, yet no one was found who was willing to give more for it.

The chancellor would doubtless have opened the biddings if any person had offered a reasonable advance upon the amount bid by the executor. No such offer having been made it was his duty to confirm the sale. We perceive no available error in the proceedings of the court below.

Judgment affirmed.

James, for appellant.

Burnam, for appellees.

F. B. JOHNSON v. J. M. MULLEN'S ASSIGNEE.

Trial—Two Verdicts Against Appellant—Court of Appeals Will Not Reverse Unless for Errors of Law.

This cause having been twice tried by a jury and in each instance the verdict was adverse to the appellant; such being the facts the Court of Appeals will not reverse the judgment, except for errors of law occurring on the trial in the court below.

Witness—Personal Attendance of—Demand for Personal Attendance—Other Party May Take Deposition.

The fact that one party demands the personal attendance of a witness does not prevent the other from taking the deposition of such witness and reading it on the trial of the cause, provided the party demanding the presence of the witness goes to trial without it.

APPEAL FROM MARION CIRCUIT COURT.

October 14, 1871.

OPINION BY JUDGE LINDSAY:

This cause has been twice tried by a jury. In each instance the verdict was adverse to the appellant.

Such being the facts this court will not reverse the judgment complained of, except for errors of law occurring in the trial in the court below.

Miller was a competent witness in behalf of his assignee. His discharge in bankruptcy by the United States District Court divested him of all interest in the Miller controversy.

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The fact that a proceeding was pending against him in said court to set aside and annul his discharge did not render him incompetent; the possibility that such proceeding might result in a judgment against him is a fact which goes to his credibility and not to his competency. The court did not err in refusing to exclude from the jury the deposition of Kirk.

It was the appellant who demanded the personal attendance of the witness, and the process of the court to compel his attendance was issued at his instance and not at that of the appellee.

Section 616 of the Civil Code authorizes the court at its discretion in a proper state of case to compel the personal attendance of a witness who may be otherwise exempt therefrom. But the fact that one party demands his personal presence does not prevent the other from taking the deposition of such witness, and reading it on the trial of the cause, provided the party demanding the presence of the witness goes to trial without it.

The instructions given upon the trial are unexceptionable and embody the whole law of the case.

Judgment affirmed.

Russell & Averitt, for appellant.

Thomas, Harrison, for appellee.

SARAH JENKS, ETC., v. JOSEPH IRVIN.

Pleading Construed Against Pleader—Demurrer.

Construing the petition most strongly against the pleader, it is clear that upon the statement of facts as to the mortgage, judgment and decretal sale under which appellee acquired possession, the appellant are not entitled to the relief sought and the demurrer was property sustained.

APPEAL FROM LOUISVILLE CHANCERY.

October 6, 1871.

OPINION BY JUDGE LINDSAY:

Whether Mrs. Ellanor Ewing took an estate in fee in the lands devised to her by her husband, James Ewing. or not, there can be no doubt, that for the purposes of advancing the interests

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of his child and her children by a former husband, she had the right to dispose of such land at any time and in any manner she might deem proper.

The will imposes no limitation upon her discretion and under its provisions she could lease, mortgage or sell all or any part of the estate devised.

The petition charges that Irvine holds under a title acquired at a decretal sale made by the Louisville chancery court many years since.

It is alleged that the judgment of said court was founded upon a mortgage executed by Mrs. Ewing after her marriage with Lease, and also to satisfy certain debts due and owing by the Testator.

It is further alleged that Mrs. Lease and her last husband in making said mortgage encumbered only her life estate, and that no greater estate than that was adjudged to be sold.

Neither the mortgage nor the judgment of the court under which the sale was made are made exhibits. What estate she did mortgage is a question of law as well as of fact.

It must depend upon the construction of the writing and can be ascertained only by an inspection of it.

From the language used by the pleader it is clear that it was not intended to charge specifically that the mortgage did not upon its fact purport to convey an estate in fee in the lands embraced by it, but rather that this conclusion is reached because of the assumption that Mrs. Lease owned no greater interest in the land than a life estate and consequently that her deed could not so operate as to pass a greater interest than she owned.

After alleging that she mortgaged her life estate, it is stated that "the interest of said Ellanor was ordered to be sold, and then that the chancery court" had no power to sell more than the life estate of said Ellanor.

In these conclusions of law we do not concur. Mrs. Lease was directed out the estate devised to pay the testator's debts, and she could sell any of the devised property to accomplish this end.

She was authorized to dispose of the entire estate devised at any time she might deem it proper to do so. She did conceive

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it proper to mortgage the estate, we must assume in pursuance of her rights under the will.

The chancery court had the power without making appellants or their deceased half-sister parties to foreclose this mortgage and sell the estate conveyed and invest the purchaser at its sale with a perfect title to the lands sold.

If this was not done appellants should have set out a state of facts in that petition showing that no greater interest in the lands than an estate continuing as long as Mrs. Lease should live was decreed to be sold.

The facts they do set out rebut their legal conclusions and tend to show that they have no cause of action.

It was unnecessary perhaps that they should disclose in their petition the defense of Irvine, but as they chose to do so and developed the fact that it was considering all the facts alleged in their petition, a good and valid defense.

The appellees' demurrer was properly sustained. Construing the petition most strongly against the pleaders, it is clear that upon the statements of facts as to the mortgage, judgment and decretal sale under which Irvine acquired possession, they are not entitled to the relief sought.

Appellants failing to amend the chancellor did not err in dismissing their petition.

Wherefore the judgment is affirmed.

Barrett & Roberts, for appellants.

Wooley & Gibson, for appellee.

L. C. REED v. BENJAMIN MARTIN.

Trial—Verdict—Evidence, Preponderance of.

If the finding of a jury is not palpably wrong, a reversal cannot be had upon the sole ground that the evidence preponderates against the verdict.

APPEAL FROM OWEN CIRCUIT COURT.

December 14, 1871.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

The three instructions given upon the trial of this action correctly expounded the law of this case, and there is certainly proof in the record conducing to establish the state of facts upon which the two instructions given at the instance of appellee were hypothicated.

The finding of the jury is not palpably wrong, and a reversal cannot be had upon the sole ground that the evidence preponderates against the verdict upon which appellees judgment is founded.

Judgment affirmed.

Chief Justice Pryor did not sit in this case.

Craddock & Trabue, appellant.

R. H. POSTON *v* J. E. MERCER.

Landlord and Tenant—Attornment—Forcible Detainer.

The appellant having entered and held the land, in dispute, as the appellee's tenant in 1869, and during that year verbally negotiated for a renewal of his lease for 1870, but on the first day of that year refused to execute the new contract, and openly disclaimed to hold under the appellee and asserted claim to the possession exclusively as the tenant of another, refusing to make restitution of the premises to appellee, he was liable to the proceedings by warrant for forcibly detaining the possession.

APPEAL FROM BALLARD CIRCUIT COURT.

March 27, 1872.

OPINION BY JUDGE HARDIN:

It does not appear that the attempted partition of land between Caldwell and the appellee was made effectual by any confirmatory of final adjudication at the time of the alleged forcible detainer, but that decision, never satisfied, seems to have been soon afterwards set aside by the court. Whatever right Caldwell's joint interest in the entire tract of land may have given him as to the control of the possession of each parcel of it, jointly or in common with the appellee, if there had been

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no separate holding of the different farms or improvements it seems to us that the appellant having entered and held the land in the dispute as the appellee's tenant in 1869 and during that year verbally negotiated for a renewal of his lease for 1870, but on the first day of that year, refused to execute the new contract, and openly disclaimed to hold under the appellee and asserted claim to the possession exclusively as the tenant of Caldwell, refusing to make restitution of the premises to the appellee, he was liable to the proceedings by warrant for forcibly detaining the possession, and the jury in the county and the circuit court on the traverse properly so decided. Wherefore the judgment is affirmed.

Bigger & Moss, for appellant.

White and Bishop, Rodman, Corbett, for appellee.

CHAS. W. POPE *v.* J. W. FORSEE.

Process—Service on Agent—Burden on Plaintiff.

The burden is on the plaintiff to show that the facts exists, to make the service of a summons on a person other than the defendant, sufficient under the provisions of the code.

APPEAL FROM JEFFERSON COURT of COMMON PLEAS.

February 9, 1872.

OPINION BY JUDGE PETERS:

We cannot from the evidence in this case conclude that at the time the summons was executed on Forsee he was the agent of the Memphis and Arkansas River Packet company, and that the service upon him of appellant's summons is such a service on an agent as is contemplated by the 80 Section of the Civil Code.

The burden is on appellant to show that the facts exist to make the service of the summons on a person other than the defendant sufficient under the provision of the code supra, and we think in this case the evidence is not sufficient.

Wherefore the judgment is *affirmed*.

Barnett, Edwards & Harding, for appellant.

Caldwell, for appellee.

Opinion of the Court.

JAS. C. RUDD *v.* GEO. WEISINGER.

Continuance—Affidavit Read as Evidence.

It is not error to refuse a continuance where by agreement of the parties the affidavit filed in support of a motion for a continuance is permitted to be read as evidence in the cause.

Attorney and Client—Jury to Fix Value of Service.

Where the employment of an attorney is fully proven and that he was to have a reasonable fee is well established, it is for the jury alone to determine what the services were worth.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

February 7, 1872.

OPINION BY JUDGE PRYOR:

The only ground relied on for a new trial in the court below was the refusal on the part of the court to grant the appellant a continuance of the cause on the affidavit filed by his attorney. This affidavit, by consent of the appellee, was permitted to be read as evidence in the cause; it is true that the law permitting the affidavits to be read as a deposition had been enacted but a few days previously, but in this we can see no reason for rejecting the affidavit, and its being permitted to be read was in favor of the appellant, and to the prejudice of the appellee.

The employment of appellee as counsel is fully proven, and that he was to have a reasonable fee is equally as well established. It was for the jury alone to determine what appellee's services were worth. The testimony authorized the verdict and the judgment of the court below is affirmed.

Harrison, for appellant.

J. G. Wilson, W. O. Harris, for appellee.

R. H. ROSSEAU & W. D. CRADDOCK *v.* E. J. MITCHELL.

Bills and Notes—Misdescription of Note—Error In Calculating Interest—Misprision.

The misdescription of a note is not sufficient to authorize a reversal of the case and an error in the calculation of the interest at the time of the judgment, is a clerical misprision, which can be corrected on motion.

Opinion of the Court.

Attachment—Garnishment—Judgment Against Garnishee—Must Have Money and Not Property in His Hands.

The allegations upon which the judgment was rendered against Craddock is to the effect that he had money, property, choses in action, and legal and equitable interest in property belonging to Rosseau in his hands and under his control more than sufficient to pay the debt sued for.

Held, that if Craddock had in his hand money sufficient to pay such debt it might have been proper to render a judgment against him, but he could not be compelled to pay Rosseau's debt and then convert property in his hands belonging to Rosseau, into money for the purpose of reimbursing himself.

APPEAL FROM LOUISVILLE CHANCERY.

February 16, 1872.

OPINION BY JUDGE LINDSAY:

The mis-description of the note sued on is not sufficient to authorize a reversal of the judgment against Rosseau. The alleged error in the calculation of the interest and at the time of judgment is a clerical misprision, which can be corrected upon motion. The petition alleges that the note was assigned and transferred by the payees to this plaintiff, and this allegation stands confessed.

We perceive no error in the proceedings or judgment as to Rosseau authorizing the reversal thereof by this court.

The allegation upon which the judgment was rendered against Craddock is to the effect that he had money property choses in action and legal and equitable interests in property belonging to Rosseau in his hands and under his control more than sufficient to pay the debt sued for. If he had in his hands the money sufficient to pay such debt, it might have been proper to render a judgment against him, but that fact is not alleged.

But certainly he ought not to be compelled to pay Rosseau's debt, and then convert property choses in action and legal and equitable interests in property belonging to Rosseau and under his control, into money for the purpose of reimbursing himself for such payment. The proper course would have been to compel him to disclose the amount and character of such property to the court, and then to subject the same to the payment of appellee's judgment.

Opinion of the Court.

As to Craddock, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Dembeitz & Eehle, for appellants.

Thompson Booth & Klein, for appellees.

JAMES M. RAY, ETC., v. GEO. H. KNOWLES, ETC.

Actions—Suit Should be Against Corporation and Not Against Stockholder.

This action should have been brought against the Licking River Lumber and Mining Co. in its corporate capacity, and not against the stock holders.

Appeals and Errors, Who May Appeal.

The stockholders of a corporation have no right to prosecute an appeal from a judgment against the company in its corporate capacity.

APPEAL FROM MORGAN CIRCUIT COURT.

January 30, 1872.

OPINION BY JUDGE LINDSAY:

This action should have been brought against the Licking River Lumber and Mining Company in its corporate capacity and not against the incorporators and stockholders, composing that corporation.

The judgment, however, is rendered against the corporation.

This appeal is prosecuted by certain persons who say that they compose the Lumber and Mining company.

There has been no judgment against these persons. In their individual capacities they have no right to complain on account of the action of the court below. No appeal is prosecuted by the company against which the judgment was rendered. These appellants being no parties to the judgment their appeal must be dismissed.

This dismissal, however, is not to prejudice the right of the Lumber and Mining company to prosecute their appeal.

Phister, Kendall, Hargis, for appellants.

Opinion of the Court.

JASPER RAKE *v.* J. P. B. HILL.**Jurisdiction—Credit Must Be Applied to Accrued Interest.**

The payment of the fifty dollars on the debt should first be applied to the discharge of the accrued interest; this being done, the balance remaining when credited on the principal did not reduce the amount due to fifty dollars.

APPEAL FROM GREENUP CIRCUIT COURT.

January 24, 1872.

OPINION BY JUDGE LINDSAY:

The payment of the fifty dollars on the debt due to appellee should first be applied to the discharge of the accrued interest, this being done, the balance remaining when credited on the principal did not reduce the amount due to fifty dollars, hence the circuit court had jurisdiction of the subject matter of the suit.

The evidence does not sustain the deceit upon the part of appellee pleaded and relied on by appellant as a defense to the action. We perceive no error in the action of the circuit court in sustaining the detachment.

Judgment affirmed.

Roe, for appellant.

Ireland, for appellee.

JAMES ROBINSON *v.* W. P. OWSLEY, ETC.**Roads and Passways—Private Passway—Dedication—Prescription—Land of Vendor Surrounding Land of Vendee.**

A private passway can not be created by dedication; it must be granted, and this grant must be proven, either by a writing, or by a continued use and enjoyment, under a claim of right, for the term of fifteen years.

Such a right might be implied in a case in which the vendor owned lands entirely surrounding those sold to his vendee.

APPEAL FROM LINCOLN CIRCUIT COURT.

January 13, 1872.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

The conveyances under which appellees hold do not reserve a right of way over that lands in favor of appellants. The conveyances to appellant's remote vendor, who was purchaser at the sale made by the agent Owsley, does not attempt to secure to him a right of way over the land of appellees.

The announcement at the auction sale that such reservation should be made was an agreement for the sale of an interest in real estate. It was never reduced to writing. Appellant's remote vendor, Wm. J. Miller, accepted his conveyance without having this agreement incorporated therein. There is no evidence conducing to show he was not apprised of this omission in the deed at the time of its acceptance.

A private pass-way cannot be created by dedication. It must be granted, and this grant must be proved, either by a writing or by a continued use and enjoyment under a claim of right for the term of fifteen years. *Bowman v. Wickliffe*, 15 B. Mon. 68; *Hall v. McLeod*, 2nd Metcalfe 104.

Such a right might be implied in a case in which the vendor owned land entirely surrounding those sold to his vendee, but such is not the case here. If a pass-way over the lands of appellee is essential to the perfect enjoyment by appellants of his lands, he must obtain it in the manner prescribed by the statutes.

Judgment affirmed.

Hill & Alcorn, for appellant.

Owsley & Burdett, for appellee.

H. T. PATTON v. H. KASSON.

Shriff and Constable—Collections—

Evidence of Debt Must be Returned When It Cannot be Collected—No Right to Employ An Attorney.

Where a constable undertakes to collect a debt and he finds out that he cannot do so, it is his duty to return the evidence of the debt. He has no authority to select an attorney, and if he does so he is responsible for the competency and fidelity of the agent selected by him.

Opinion of the Court.

APPEAL FROM BOURBON CIRCUIT COURT.

January 8, 1872.

OPINION BY JUDGE PETERS:

It appears from the receipt executed by appellant to appellee that he undertook as Constable of Bourbon county to collect the debt which the latter held on Haney, and when he ascertained that he could not collect the debt by legal process, either because the debtor was no inhabitant of the county or had no effects therein, it was his duty to have returned the evidence of the debt to appellee. He had no authority to select an attorney in a different county, and if he did so, he would be legally responsible for the competency and fidelity of the agent selected by him. Unless appellee within a reasonable time after being informed of the selection he had made, repudiated his act and notified him thereof; and whether the acts of appellant in the premises were communicated to appellee and he ratified or repudiated them were facts which was the province of the jury to determine.

The two instructions given by the court upon being asked to instruct the jury, by appellee, if they had remained without qualification, would have been in conflict with the legal principle herein stated, and erroneous; but the instruction given on motion of the attorneys for appellant qualified the other two, and taken together presented the law of the case correctly to the jury. Wherefore the judgment is affirmed.

Hansons, for appellant.

Davis, for appellee.

MARY L. PRICE, ETC., v. E. M. GATT.

Forcible Entry and Detainer—Distinct Offenses.

Traverse—Jury Must Find Party Guilty of Same Offense.

A forcible entry is an entry on land or tenements without the consent of the person having the possession in fact of the premises. Forcible detainer is the refusal of a tenant to surrender to his landlord the lands or tenements demised, after the expiration of his term.

On a traverse the jury in the circuit court must find the party

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charged guilty of the offense of which he was found guilty by the jury in the country.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

March 22, 1872.

OPINION BY JUDGE PETERS:

A forcible entry is defined by Sec. 500 *Civil Code* to be an entry into lands, or tenements without the consent of the person having the possession in fact of the premises. And a forcible detainer is the refusal of a tenant to surrender to his landlord the land, or tenements demised after the expiration of his term. They are therefore distinct offences, and so they were before the adoption of the Code. But it was held by this court under the old practice that both offences could be charged in the same warrant, and the jury in the country might find the party charged, guilty of either one or both of the offences, and upon a traverse the jury must find the party guilty of the offence of which he was found guilty by the jury in the country.

The court below properly overruled the motion to quash the warrant, and also the demurrer thereto.

The jury who tried the traverse found the inquisition true, and as neither the evidence nor the instructions are certified to this court by a bill of exceptions we cannot disturb the finding of the jury.

As to the irregularities which occurred before the justice and which do not affect the merits of the case, upon a traverse, must be disregarded. *Jones v. Skiles*, 1 Mar. 54. Appellants were the traversors if the Jefferson court of Common Pleas had refused to entertain jurisdiction of the traverse, the proper order would have been to dismiss it which would have remitted the traverse to the benefit of her judgment for restitution rendered by the justice on the verdict of the jury before him, and surely the refusal of the court below to do so was not prejudicial to traversor. Judgment must be affirmed.

Whitaker, Walker, for appellant.

Bradley & Sumrall, for appellee.

Opinion of the Court.

JOHN W. PARRISH'S ADMR. v. L. W. COWLES.**Executors and Administrators—Contract for Board of Family Revoked by Death of Intestate—Widow Responsible for Board After Death of Husband.**

The intestate made a contract with appellee to board his wife and child, during the time he should remain in the army, from September, 1861, the time he left, until he died in December, 1862. His estate was bound for reasonable price for the board of his wife and child until his death, but the contract ended then and his widow was responsible out of her own estate for the board of herself and child thereafter, and she might charge the estate of her infant son with a reasonable sum for his board.

Executors and Administrators—Settlement of Different Estates Should be Made Separately.

The estate of Seth T. Parrish should be first settled, and then the estate of Susan A. Parrish should be settled, and then the administrator's accounts as guardian for John W. Parrish should be settled separately.

APPEAL FROM EDMONSON CIRCUIT COURT.

April 25, 1872.

OPINION BY JUDGE PETERS:

It seems to this court that the principles upon which the master settled the accounts of appellee Cowles are not correct and the judgment rendered not authorized.

The evidence conduces to prove that the intestate Seth T. Parrish made a contract with appellee to board his wife, and son during the time he should remain in the army, and from September, 1861, the time he left until he died which was perhaps in December, 1862, his estate was bound for a reasonable price for the board of his wife and child, at his death that contract was at an end, and if appellee then charged for their board, the widow would be responsible out of her own estate for a reasonable price for board, and she might charge the estate of her infant son with a reasonable sum for his board.

The estate of Seth T. Parrish should be first settled and, after paying his debts including a reasonable allowance to appellee for boarding his wife and child, the balance would remain to be distributed between them.

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Then appellee's accounts as administrator of Susan A. Parrish should be settled and he allowed what he actually proves he paid out for attendance on Mrs. Parrish for medicines, medical attention, nursing and funeral expenses, etc., and he should be allowed a reasonable compensation for the board of herself and son.

And his accounts as guardian for John W. Parrish should be settled separately, also, in which he should be charged with all the money he received as bounty and pensions for the military services of John W. Parrish's father, and allowed a reasonable compensation for expenses and trouble to collect the same. He should account for \$26.35 which he admits in his answer he collected from Gardner; \$26 collected of appellant, and the bonds on Wingfield for his ward's land, all of which seem to be omitted from the master's report.

In appellee's account marked "H," filed as part of his counterclaim he charges \$25 for services and fee in recovering back pay and bounty from U. S. Government, \$190, while he neither admits nor denies directly that he collected said \$190. This sum he should be charged with, unless he gives some better explanation about it than he has done in his answer.

Wherefore the judgment is reversed and the cause is remanded with directions for further proceedings consistent herewith.

P. F. Edwards, for appellant.

R. Rhodes, for appellee.

JOHN A. RAIN, ETC., v. KITTY STURGEON'S ADMR.

Gifts—Causa Mortis—By Delivery—Consideration—Mere Promise Cannot be Enforced.

An individual can make a gift by delivery but his mere promise to make a gift can not be enforced, although in writing, unless there is a consideration for the promise. The fact that one named a child for another, where there is no relationship existing, is not sufficient to uphold a promise.

APPEAL FROM HARDIN CIRCUIT COURT.

February 22, 1872.

Opinion of the Court.

OPINION BY JUDGE PETERS:

The paper on its face shows that Mrs. Sturgeon, who signed it, never intended it to have the force and character of a valid promissory note in her life time.

It was not delivered to be enforced against her, but against her estate after her death.

An individual can make a gift of goods, chattels and money to another by delivery, but his promises to make a gift of any of these things cannot be enforced. But if there is a consideration for the promise, it is not a gift. *Phelps vs. Phelps*, 28 Barb. 121, 7. Johns; Repts. 25. *Pearsons vs. Pearson*. We then must inquire whether there is a sufficient consideration proved in this case to uphold the promise. It does not appear that there was any consideration for the promise except that appellant had named a daughter for Mrs. Sturgeon, but there was no relation between the parties, and no consideration of blood, therefore, existed to uphold the promise. It is then a mere promise to pay a sum of money as a mere gratuity or gift, and, although it is in writing, cannot be enforced. *Mark v. Clark & Wife*, 11 B. Monroe 44. Judgment must be affirmed.

Wilson, for appellant.

Merriott, for appellee.

ANTHONY ROBERTSON v. SAMUEL ULTINGER. ,

Wills—Legacy to Revert to Testator's Estate Upon the Death of Any of the Legatees.

All the estate loaned to testator's wife, except the land already disposed of, shall be divided into six equal parts, giving to the grandsons one equal part with the testator's children, and if either one of the six shall be dead (that is, at the death of the wife), leaving no child or children, then his or her part, so dying, is to revert back to the testator's estate and be equally divided among his surviving children and the children of such as may be dead."

Held, that the deviser intended that if either of his children or grandchildren died without issue, that his or her part should revert back to the survivors.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 6, 1872.

Opinion of the Court.

OPINION BY JUDGE PRYOR:

The deviser by the ninth clause of his will recites the fact that he has already given his son, Benjamin Crum, one hundred and twenty acres of land, and that at the death of his wife the balance of his land is to be divided into five equal parts, his three daughters to have a share each and his grandsons a share each, and further devises that all of his estate loaned to his wife, except the land already disposed of, shall be divided into six equal parts, giving to each one of his grandsons, one equal share with his children, and *"if either one of the six shall be dead (that is at the death of the wife) leaving no child or children, then his or her part so dying is to revert back to my estate and be equally divided among my surviving children and the children of such as may be dead."*

He also directs that the portion of his estate willed to his daughter Martha Weathers, if she should die without children "is to, after giving her husband a life estate therein, be equally divided between all of his children and the children of such as may be dead." The deviser further provides, that should any of my children die leaving no issue then it is my will and desire that the part or parts of my estate in the hands of said deceased ones, shall revert back to my estate, and be equally divided between all my children then living and such of my grandchildren as may then be living, and this item is to apply fully to my lands, so that if any of my children die leaving no issue then the land from my estate in the possession of said deceased one or ones, shall likewise revert to my estate and be equally divided between all my children and grandchildren then living.

The deviser certainly intended when he executed this will that if either of his children or grandchildren died without issue, that his or her part should revert back to the survivors. The grandchildren were as much the objects of his bounty as the children, as is evident for the reason that he gave them the same interests in his estate, but did he intend to place a limitation upon the rights of his own children to dispose of their interests in his estate, and at the same time vests his grandchildren with the absolute title? We think not. The whole will evidences the fact that they were to own equal interests (except half) and to

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hold their property in the same way. The construction placed upon the will by the counsel for the grandson would give to him an interest in the estate devised to each one of the survivors children in the event they died childless, but they would be entitled to no part of the grandsons' interest in the event he died without children. The grandson could dispose of his part of the estate by will or otherwise and the devisor's own children are prohibited by the provisions of the will from disposing of their interests in order that the grandson may inherit it upon the happening of the contingency mentioned, viz: dying without issue. His daughter, Martha Weathers, who has no children, is not permitted to dispose of her estate, but the grandson is. This construction of the will would vest the two grandsons with a greater estate than the devisor's own children, and this he never intended. The devisor says: that should any of my children die leaving no issue, then that interest is to revert back and belong to my children and grandchildren living, and this item is to apply fully to my lands, etc. A blank seems to have been left in the will and within that blank is filled with children or grandchildren, it makes no difference. The intention of the devisor we think is clear, and that is: that the children and the grandchildren should hold this property alike. If the grandson should die without leaving children his interest in the estate will pass to the surviving devisees under the will. The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Kinhead & Buikner, for appellant.

Carr, for appellee.

R. RUHL v. CITY OF LOUISVILLE.

Trespass—Municipal Corporation Responsible for Tort If Commanded or Sanctioned.

A municipal corporation is responsible for damages for a trespass or other tort, if it commands it to be done or sanctions or approves the act when committed.

APPEAL FROM JEFFERSON CIRCUIT COURT.

February 2, 1872.

Opinion of the Court.

OPINION BY JUDGE HARDIN :

In the agreed statement of facts, it is admitted, in substance and effect, that under an ordinance of the general council, providing for the cleaning of the southern ditch, an important means of drainage in the city of Louisville, the mayor employed hands ditch, which run through the plaintiff's garden, threw the dirt from the ditch on said plaintiff's land and the growing crop thereon was covered over and mashed down by it and by the trampling of the hands and that the dirt thrown upon it was allowed to remain there and not removed by said city, all of which was done against the will, and with the remonstrance of plaintiff; that plaintiff was damaged thereby in the sum of \$68.70; also, that great quantities of dirt had settled in said ditch by reason of the defective construction thereof. It was also admitted that for the work of the hands so done they were paid off by the city. The county court, before which the case had been taken by appeal, sustained a motion to find and render judgment for the city on the ground that the agreed fact did not constitute a cause of action, and the only question now to be determined is as to the correctness of that ruling.

The doctrine is stated in *Underwood, etc., v. Newport Lyceum*, 5 B. M. 129, as we conceive in accordance with correct principles and authority that a corporation is responsible for damages for a trespass or other tort, if it commands it to be consummated or sanctions or approved the act when committed.

This case is, in our opinion, within this rule, and the judgment is therefore deemed erroneous. The agreement of facts imports both that the city authorities authorized the throwing of the dirt from the ditch from the banks and that they subsequently approved of it.

Wherefore the judgment is reversed and the cause is remanded for a new trial and further proceedings not inconsistent with this opinion.

F. G. Danaker, for appellant.

Burnett, for appellee.

Opinion of the Court.

PRESIDING JUDGE OF WASHINGTON COUNTY COURT *v.* THE CUMBERLAND & OHIO RAILROAD COMPANY.

Statutes—Legislative Acts—Constitutionality Presumed—Facts Not Appearing Must be Distinctly Charged—Facts Proven by Journal.

Everything is to be presumed in favor of the constitutionality of an act of the legislature, and the party attacking it must aver and prove every fact necessary to establish the position he assumes.

The courts will take notice of the contents of the legislative journals for the purpose of determining the truth or falsity of any allegation of fact, but they will not examine the journals for the purpose of ascertaining facts, to rebut the presumption of the constitutionality of an act, unless the party complaining alleges the existence of such fact.

RESPONSE TO PETITION FOR REHEARING.

RESPONSE WRITTEN BY JUDGE LINDSAY:

The first paragraph of appellants' answer admits that there is, upon the statute book, an act incorporating the Cumberland and Ohio Railroad company, but says that such act is void, because the provisions of Art. 2, Section 40 of the State Constitution were not complied in the passage thereof.

Ordinarily said section can not be made to apply to an act incorporating a railroad company. It is confined in its application to acts or resolutions for the appropriation of money, or the creation of debts. The incorporation of a railroad company does not necessarily involve either of these things.

If it be conceded that one or more of the provision of sections of the act in question, involves in the constitutional sense (a conclusion which we are not to be understood as making), either the appropriation of money or the creation of a debt, it by no means follows that the entire act is unconstitutional and void, because it was not voted for by a majority of all the members then elected to each branch of the general assembly and the yeas and nays entered on the journal. The appropriation of money or the creation of a debt might be void and still the act, in so far as it incorporated a railroad company, would be valid in every other particular. Appellant, however, claims that the entire act is void, and from that conclusion draws the further deduction that the appellee is neither authorized to construct

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a railroad through Washington county, nor to receive subscriptions of stock from that county.

The conclusion and the deduction drawn therefrom are both unauthorized by any fact stated.

Everything is to be presumed in favor of the constitutionality of an act of the legislature, and the party attacking it must, in a case like the present, aver and prove every fact necessary to establish the position he assumes.

If any of the provisions of the act of incorporation under which appellee is proceeding are unconstitutional by reason of anything not appearing upon the face of the act itself.

The facts not so appearing must be distinctly charged. If the journals of the general assembly establish the existence of such facts, they need not be proved, as the courts will take notice of the contents of these journals for the purpose of determining the truth or falsity of any allegations of fact, upon which they are called upon to pass, but as they will presume that every act found upon the statute books has been constitutionally passed, they will not examine the journals for the purpose of ascertaining facts, to rebut this presumption unless the party complaining alleges the existence of such facts. After a second examination of the question we are still satisfied that the demurrer to the paragraph was properly sustained.

The judge of the Shelby county court acted judicially in deciding that the railroad company had complied with the conditions imposed when the question of subscription was submitted to the voters of Shelby county, and ministerially in making the subscription.

In this distinction we observe no inconsistency will be found to exist between the opinions of this court in this and the Shelby county case.

The case of *Wright vs. Shelby County*, 16th B. Monroe, 4, is an authority against the positions assumed by appellant. The doctrine of that case is that the organization of a corporation cannot be attacked collaterally.

The petition in this case must be overruled.

P. B. & J. B. Thompson, for appellant.

Knott, for appellee.

Opinion of the Court.

L. B. RUCKER *v.* THOMAS S. JOHNSTON.

Trial—False Statement of Witness—Instructions on—Argument of Counsel Upon Facts Not Appearing in the Record.

Appellant asked for an instruction to the effect that, if any witness for appellee had sworn to a material fact on the trial, knowing at the time that the statement was false, the jury had the right to disregard his whole testimony. This instruction the court below refused to give.

Held, that the instruction should have been given and that the defendant's case was prejudiced by the argument of counsel for appellee.

APPEAL FROM CALDWELL CIRCUIT COURT.

March 21, 1872.

OPINION BY JUDGE PRYOR:

After a careful examination of the facts presented in this record we are satisfied that the appellant should have been awarded a new trial. The principle and, in fact, the only witness upon whose testimony the money in controversy was traced to the hands of the appellant and himself once had possession of it and was sued for failing to pay it over. In his answer to that suit he attempted to make an evasive denial of his knowledge in regard to the package, says "that Cobb told him upon handing him a letter that it contained a little money, and that by some mistake he lost said letter without any neglect on his part. This answer was sworn to by the witness (Davis) and upon the trial of the present suit he swears that the statements in the answer made by him were not true, and that he knew at the time of swearing to them they were not true, and that he delivered the package or letter to the appellant Rucker. The court in the instruction given to the jury said to them in substance that if the appellant obtained the package of money and failed to pay it over to the party entitled upon demand, that he was liable. We perceive no objection to this instruction, but after the case was submitted to the jury and whilst the counsel for the appellee was making his argument, the appellant's counsel asked for an additional instruction to the effect that if any witness for the appellee had sworn to a material fact on the trial knowing at the

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time that the statement was false, they have the right to disregard his whole testimony. This instruction the court refused to give and permitted the counsel for the appellee in his concluding argument to appeal to the prejudices of the jury upon a statement of facts not appearing in the record. That evidently when taken in connection with the refusal to give the instruction prejudiced the defense in the case. The instruction ought to have been given and particularly after the concluding argument had been made by counsel for the appellee. The judgment of the court below is reversed and the cause remanded with directions to set aside the verdict and give the appellants a new trial.

F. W. Darby, for appellant.

Jas. R. Hewlett, for appellee.

PRICHARD & BOLT v. JOHN LEWIS.

Vendor and Purchaser—Consideration—Part Cash and Remainder for Support of Vendor for Life—Vendee's Lien—Attaching Creditor's Lien on Cash Payment.

The appellants had their attachment levied on the tract of land to which Andrew Lewis had the legal title. Andrew obtained a deed for the land in controversy from his father for the consideration of six hundred dollars in hand paid and the further consideration that he would support his father, on the land, during his natural life. The father had the deed cancelled upon the allegation that the consideration had failed. The appellants had obtained a lien on the land previous to the filing of the petition for cancellation, by the levy of their attachment.

Held, that the only lien the father has upon the land is for his support during his life. This lien should have been enforced by the chancellor instead of canceling the deed, and he should be permitted to live upon the premises during his life, and the land should be subjected in a proper proceeding to the debts of the attaching creditors.

APPEAL FROM MAGOFFIN CIRCUIT COURT.

January 30, 1872.

OPINION BY JUDGE PRYOR:

The appellants, Prichard and Bolt, had their attachment levied on the tract of land to which Andrew Lewis had the legal title.

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Their claims were asserted against him and so far as the record shows, ought to be enforced. The appellee, John Lewis, is made a defendant by the appellants to the several actions in which their attachment were obtained. It seems that Andrew Lewis obtained a deed to the land in controversy from his father, John Lewis, for the consideration of six hundred dollars in hand paid, and the further consideration that he would support John Lewis and his wife during their natural lives on the land conveyed. John Lewis in his petition filed and consolidated with the actions brought by the appellants, seeks to have a cancelment of the deed to his son, upon the allegation that the son has failed to comply with his contract or the covenants in the deed, that his son failed to support and maintain himself and his wife as he obligated himself by the deed to do and therefore the consideration has wholly failed. The court below upon the hearing cancelled the deed, and from that judgment the appellants have appealed. The appellants had, previous to the petition, filed by John Lewis, obtained a lien on this land conveyed by the father to the son by the levy of their attachments. The father had acknowledged the consideration of six hundred dollars of the purchase money paid and, whether paid or not, it is, so far as creditors are concerned, to be taken as paid over any lien of the grantor released to that extent. The only lien that John Lewis has upon the land is for his support and maintainance during his life, his wife being dead. This lien should have been enforced by the chancellor instead of cancelling the deed. The land seems to be of but little value, as its rental value is placed at seventy-five dollars per annum, hardly a sum sufficient to support the old man in his declining years. The deed recites that the old man is to live and be supported on the place. The whole of this farm, the right to use and control it during the old man's life is not more than he ought to have and the court should permit him to live upon the premises during his life with the right to use and cultivate the place in a husbandlike manner, and with this incumbrance upon it, the land should be subjected and is liable in a proper proceeding to the judgment for the debts of the attaching creditors.

The question as between the attaching creditors and Andrew Lewis are not before the court and cannot now be disposed of.

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The judgment of the court below is reversed and cause remanded for further proceedings consistent with this opinion.

Botts, for appellants.

JOSEPH POLLOCK, RECEIVER, ETC., v. W. F. HARDING, ETC.

Sheriff and Constables—Default on County Dues Collected—County Proper Party to Sue.

Where a sheriff fails to pay over taxes collected for a county to the proper custodian, the county is the proper party to institute proceedings therefor, and not the custodian of the county funds.

APPEAL FROM GREENUP CIRCUIT COURT.

January 25, 1872.

OPINION BY JUDGE PETERS:

By an act approved March 1867, entitled an act for the benefit of negroes and mullatoes of this commonwealth, Sess., Acts 1867, page 94, it is provided that the capitation and other taxes collected from negroes and mullatoes shall be set apart and constitute a separate fund for the support of their paupers and the education of their children.

Under this enactment a capitation tax and taxes on the taxable property of the negroes and mullatoes of Greenup county were levied in 1868 amounting to \$112.61, which were collected by the sheriff of said county and, failing to pay it over to appellant, the receiver appointed by the county court under the act *supra*, there being no treasurer for that county, he brought this action in his own name as receiver against the sheriff and his sureties on his bond. The sheriff made no defense and judgment went against him by default, but his sureties controverting in their answer their liability on final hearing the petition as to them, was dismissed and the receiver Pollock has appealed.

The sheriff and his sureties are liable on their bond for this tax, as much so as for other county levies and taxes, they were assessed and made collectable as other county dues. But as the statute under which the assessments were made fails to prescribe the mode and declare in whose name the action must

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be brought against the defaulting sheriff, the remedy must be in conformity to the general law on the subject.

By the last paragraph of Sec. 6, Art. 2, Chap. 26, R. S., 2 vol., p. 299, the county court is authorized to prosecute an action or motion on the bond if the sheriff or collector of the county dues, etc. The appellant had no interest in the money sued for, being the mere custodian of the funds, subject to the control of the county court, and the action should have been in the name of the county court.

The answer presented no defense to the action but as it was improperly brought it was not error in the court below to dismiss the petition as to appellees, as that dismissal will not bar an action in the name of the county court for the amount collected.

Wherefore the judgment is *affirmed*.

W. J. Sands, for appellants.

Dulin, for appellees.

DAVID PRESTON *v.* ISAAC SMITH.

Process—Nonresident—Warning Order—Validity of—Code Must be Literally Followed—Vold Order Gives Court No Jurisdiction—Sales Made Under Vold Order is a Nullity.

To make a warning order valid and effectual, the provisions of the code must be literally followed. The clerk has the power to warn the defendant to appear on the first day of a term, which does not commence within sixty days after the order is made. The clerk warned the defendant to appear on the sixth day of the term. His action being without warrant of law, must therefore be treated as void. The warning order being void, the court had no jurisdiction over the property attached and the judgment directing it to be sold is a nullity.

APPEAL FROM BARREN CIRCUIT COURT.

January 20, 1872.

OPINION BY JUDGE LINDSAY:

Isaac Smith joined the Confederate army in the early part of the year 1862. Various creditors instituted proceedings against him in the courts of Barren county, and under the provisions

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of the act of December 23, 1861, sued out attachments and levied them upon his estate both real and personal. In September, 1863, the various causes pending against him, over twenty in number, were heard together, and a judgment rendered directing the sale of the attached property. At the sale made pursuant to this judgment, David Preston bought a tract of two hundred and twenty-four acres of land, at \$15 per acre; John B. McConnell, a tract of one hundred and four acres at \$15 per acre, and I. W. Dickey, a tract of fifty-eight acres at \$16.25 per acre.

These sales were duly reported and confirmed. The purchase price for each tract was paid, and conveyances made and possession delivered to the purchasers. The moneys thus realized were distributed among the various judgment creditors.

In September, 1866, Smith, who had been proceeded against upon constructive service, appeared in court and moved for a new trial in all the actions against him as allowed in such cases by section 445 of the Civil Code. This motion was sustained. At the same time he filed a pleading in the nature of a petition, against Preston Dickey and McConnell and others, the purchasers of his lands, asking that the sales under which they claimed title should be set aside, the possession of the property restored to him and the rights of all the parties settled.

He claimed this relief upon various grounds, which were specifically set out, among them, he alleged that he was not before the court in any of the cases upon actual service of process, and that in some of them no warning orders were taken out against him, and hence that he was neither actually nor constructively summoned.

Upon an examination of the record, we find that in the case of David R. Young and Company, instituted March 15, 1862, the warning order is in these words, "It appearing from the petition (sworn to) that the defendant Smith is a non-resident of this state, he is hereby warned to appear in the Barren county and criminal court on or before the 6th day of its next June term, and answer plaintiff's petition." By section 88, Civil Code, it is provided that where it is made to appear in the prescribed manner that the defendant is a non-resident of this state, the clerk shall make, upon the petition, an order warning such defendant to appear in the action on the first day of the next term

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of the court which does not commence within sixty days of the time of making the order.

This court has uniformly held to make a warning order valid and effectual the provisions of the code must be literally followed. The clerk must exercise the power vested in him in accordance with the terms of the statutes. He has the power to warn the defendant to appear on the *first day* of a term, which does not commence within sixty days after the order is made.

He has no power to warn him to appear on the sixtieth day of such term. His action in this case being without warrant of law must therefore be treated as void. *Brownfield v. Dyer*, 7th Bush 505; 4 Munroe 546; 6 Munroe 205.

The order of warning in this case being void, the court had no jurisdiction over the property attached, and the judgment directing it to be sold in satisfaction of the claim of D. M. Young, etc., is a nullity. In the case of M. Delph it does not appear that it was ever attempted to take out an order of warning, and return on the process shows that Smith was not found. The judgment directing the sales of the land to satisfy Delph's claim is therefore clearly void. It is not necessary to notice other irregularities and misconduct complained of upon the part both of the plaintiffs and the purchasers. The fact that the causes were all heard together, that the judgment was joint and decreed a sale of all the lands to satisfy all the debts embraced in it, connected with the further fact that in two of these cases the court had no jurisdiction, made it in our opinion the imperative duty of the court to set aside the sales. It was not possible to ascertain what portion of the lands were sold to satisfy the debts of D. M. Young, etc. Nor the debt of Delph. In fact the judgment directed all the land to be sold in satisfaction of all the debts embraced therein. The sales being void in part, there was no way in which the equities of the parties could be protected other than by vacating them, and the court below did not err in so doing. The fact that Smith answered the petition of Grinstead, and did not, so far as the record shows, object to the consolidation of that with the other causes, cannot be regarded as the entering by him of his appearance in such causes.

This conclusion renders it unnecessary for us to determine whether or not a party constructively summoned can, under the

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provisions of the 445th section of the Code, so far open the judgment as to affect the title of purchasers.

We perceive no error in the judgment of the court, settling the rights of the parties as to rents, improvements and interest. Judgment affirmed.

*C. B. Seymour, Lesle & Both Barrett & Roberts for appellant.
James, for appellee.*

A. G. RATCLIFF V. GALLAGHER & HOLMAN, ETC.

Accession—Specification—Rights Acquired By.

Nunan acquired the right to the stone in the quarry and Gallagher and Holdman entered, raised and dressed the stone for the purpose of putting it into the abutments of the bridge, which they had undertaken to erect for Nunan, so that if they had acquired a right to the stone it was either by accession or by specification.

The right by accession is acquired by adding other material to that of another individual taken innocently and by skill and labor. The material must be so changed as to be incapable of being restored to the owner in its original form.

The right by specification can only be acquired when without the accession of any other material that of another person, which has been used by the operator innocently, has been converted by him into something specifically different in the inherent and characteristic qualities which identified it.

Held, that the material operated on by the mechanics has not been changed, the same inherent and characteristic qualities exist, now, that composed the material when it was removed from its bed, and being such, the property remained in Nunan.

APPEAL FROM THE CALDWELL CIRCUIT COURT.

March 25, 1872.

OPINION BY JUDGE PETERS:

Prior to March, 1870, appellee, Nunan, had contracted with Patrick Gallagher and M. R. Holman to prepare the stone and build the abutments for a bridge across Montgomery creek in Caldwell county for the Elizabethtown and Paducah railroad company.

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Nunan, having contracted to grade and prepare the section of said road, for laying the iron passing over said creek, for said railroad company, he contracted with Mrs. Vickery, the owner of a stone quarry near to where said abutments for said bridge were to be erected, for the stone to build them.

To execute their contract doubtless Gallagher and Holman raised from the quarry of Mrs. Vickery procured by Nunan a considerable quantity of stone and dressed them preparatory to putting them into the abutments of the bridge. The stone thus dressed, Gallagher, without the consent of Holman, mortgaged to appellant, to secure a debt due him from Gallagher and Holman.

In a suit to foreclose that mortgage, Nunan, by his petition, caused himself to be made a defendant, and having asserted his claim successfully to the stone, Ratcliff has appealed to this court to reverse the judgment.

Nunan acquired his right to the stone in the quarry by virtue of his contract with Mrs. Vickery, the owner, and there is no pretense that Gallagher and Holman entered and raised and dressed the stone for any other purpose than to put them into the abutments of the bridge which they had undertaken to erect for Nunan. So that if they had acquired a right to the stone, it was either by *accession* or by *specification*.

The right by accession is acquired generally by adding other materials to that of another individual taken innocently and by skill and labor the material must be so changed as to be incapable of being restored to the owner in its original form, as where the wool of a stranger has been converted into cloth by a manufacturer, the fabric would belong to the manufacturer, because the several particles of wool could not be separated and identified. Here, nothing was added to the material but skill and labor, and they were not sufficient according to the definition above to divest the original owner of his property.

The right by "specification" can only be acquired when, without the accession of any other material, that of another person, which has been used by the operator innocently, has been converted by him into something specifically different in the inherent and characteristic qualities which identify it, as the conversion of corn into meal, of grapes into wine, etc. Although

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meal possesses no quality which the corn did not, yet it not only does not possess all the same qualities, but there is a difference in the name, the character, the solidity and every attribute which distinguishes one article from another.

This somewhat extended extract is taken from the very able and lucid opinion of this court delivered by Chief Justice Robertson in *Lampton's Ex'r v. Preston's Exrs.*, 1 J. J. Mar 454. In which the authorities on the question are carefully reviewed, and that being analogous to this, it illustrates the principle which should govern in the determination of this case. The material operated upon by the mechanics has not been changed, the same inherent and characteristic qualities exist now that composed the material when it was removed from its bed where it had reposed for ages.

It was still the Ashler with the rough corners broken "off and made fit for the builders' use," and being such, the property remained in Nunan. Wherefore the judgment is *affirmed*.

Hewlett, for appellant.

Bradley, Darnby, for appellee.

LESLIE MYERS v. COMMONWEALTH.**Exceptions—Bill of, Sufficiency of.**

The bill of exceptions contains the names of the witnesses and a statement of what each proved on the trial, and after which it is said, "And here the proof closed." "The court then on motion of the Commonwealth's Attorney instructed the jury as follows:" Here instructions followed, at the close of which is added, "to which instructions the defendant excepted."

This language certainly imparts that the evidence contained in the bill of exceptions was all that was given and that the instructions therein copied, are all that were given and refused by the court.

Criminal Law—Evidence—Statements and Confession Made by Prisoner—Instructions.

A material part of the evidence against appellant consisted of statements or confessions made to one of the witnesses for the commonwealth. Such evidence has always been regarded as weak, if not the most unreliable made competent by law, because it is easily misunderstood, may be recollected only in part, or perverted and misrepresented by design, and when made alone to the witness who de-

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tails it, it is difficult to disprove, therefore, the court erred in overruling instruction No. 3.

APPEAL FROM BRACKEN CIRCUIT COURT.

October 21, 1871.

OPINION BY JUDGE PETERS:

The bill of exceptions contains the names of various witnesses and a statement of what each one proved on the trial, after which it is said, "And here the proof closed," and immediately afterwards it is said, "The court then, on motion of the attorney for the Commonwealth, instructed the jury as follows," three instructions then follow as those given on motion of the attorney for the Commonwealth, at the close of which is added, "to which instructions the defendant excepted." The defendant, by his attorney, then moved the court to give the following instructions, marked 1, 2, 3, 4 and 5, whereupon the court gave instructions marked Nos. 1, 2 and 5 and refused instructions Nos. 3 and 4, to the refusal of which said instructions the defendant excepted and still excepts.

This language certainly imports that the evidence contained in the bill of exceptions was all that was given on the trial and that the instructions therein copied are all that were given and refused by the court. The statements are not as direct and as explicit as they should be, but no inference can arise from them that any more evidence was heard on the trial, or that other instructions were given or refused.

Regarding the bill of exceptions as sufficient we proceed to inquire into the propriety of the decision of the court below in refusing instructions Nos. 3 and 4 as asked by appellant.

No. 3 is as follows: Evidence of conversations between the prisoner and any other person is the weakest testimony held competent by law, and should be received with great caution by the jury.

A material part of the evidence against appellant consisted of statements or confessions made to one of the witnesses for the Commonwealth. Such evidence has always been regarded as weak, if not the most unreliable made competent by law, because it is easily misunderstood, may be recollected only in part,

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or perverted, and misrepresented by design, and when made alone to the witnesses who details it, it is difficult to disprove.

It is unreliable on account of the frailty and uncertainty of the channel through which it is communicated. *Vaughn & McKee's Heirs v. Hann*, 6 B. M. 338; *Snelling v. Utterback*, 1 Bibb. 611; *Morris v. Morris*, 2 Ib. 311.

In view of the evidence introduced on the trial the court below erred in refusing instruction No. 3 as asked.

Instruction No. 4 was properly refused. By it the jury were required to find facts therein enumerated, some of which were not material, and they might have found him guilty without being satisfied by the evidence of their existence.

The instructions given on motion of the attorney for the Commonwealth were not objected to when asked, nor was the ruling of the court in giving them excepted to, and we cannot therefore consider them; but we may say that any inaccuracy in them, if there was any, was cured by those which were given on motion of appellant. Nor was the evidence of Daniel Byars objected to, when offered, and the objection which might have been made to his evidence must be considered as waived. But for the error in refusing instruction No. 3 the judgment must be reversed and the cause remanded with directions to award a new trial and for further proceedings consistent herewith.

R. K. Smith, for appellant.

JOHN MILLETT v. R. C. MILLET.

Accounts, Action On—Promissory Notes, Prima Facie Evidence of Settlement.

Appellant, in his answer, pleads as a set-off against the demands of the appellee, three several notes executed by the latter to the former, subsequent to the transactions involved in this litigation, which are prima facie evidence that all antecedent indebtedness on either side, except the amount of the note first executed, was thereby closed up.

Accounts, Action On—Evidence—Book Accounts.

The entries in an account book kept by a party to the action are competent against him as admissions, and though in writing, still like oral admissions, the whole of the entries in the same book relating

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to the same subject must be taken together, as well as those made by the party against himself as those for himself.

APPEAL FROM FULTON CIRCUIT COURT.

June 16, 1871.

OPINION BY JUDGE PETERS:

These two suits commenced, the one on the 23d of August, 1865, for \$1,400 for unpaid balance claimed for rent of store room, and the other on the 30th of the same month for a store account of \$115.66, which were consolidated and by answers, amended answers and petitions and cross-pleadings, in the completion of which about four years were consumed, and transactions which had slept so long that time, if relied upon on either side, would have been available to secure them an eternal repose, were brought up, whereby the record was swelled into volumes and the amounts involved assumed such proportions as to culminate in a verdict and judgment unasked for and perhaps never thought of at the commencement of the controversies.

Appellant in his answer pleaded as off-sets against the demands of appellee three or four several notes or due bills executed by the latter to the former in the year 1863, being subsequent to all the transactions which have given such importance to this litigation and which were prima facie evidence that all antecedent indebtedness on either side except the amount of the note first executed was thereby closed up. But appellant opened the door for the bringing up of their previous dealings by asserting a claim for over \$11,000, for services and labor adjudged to have been performed by him for appellee, commencing in 1858 and continuing for a series of years, which invited an assertion of various large claims by appellee against him, covering the same periods relating to a mercantile transaction between them, involving long and complicated accounts and, notwithstanding the character of the controversy, these matters were submitted to the determination of a jury, although both parties, at different times during the litigation, moved the court to transfer the cases to the equity docket.

On the trial of the cause, after various exceptions were taken to depositions on both sides and objections to evidence, appellee

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read to the jury as evidence certain entries of credits on a book of accounts made by appellant in said book kept by him containing credits given to appellee or accounts showing balances in his favor or designated by the pages of said book, and which book, belonging to appellant, he was forced under a subpoena duces tecum to produce into court by appellee, appellant offered to read from the same book certain items charged against appellee for building materials furnished by him amounting to \$1,163, to the reading of which appellee objected. The court sustained the objection and refused to permit the same to be read to the jury, to which ruling appellant excepted.

These entries read by appellee were competent against appellant as admissions, and though in writing, still like oral admission, the whole of the entries in the same book relating to the same subject must be taken together, and as the trial was by jury, it was for the jury to consider, under all the circumstances, what credit they should give to the whole of the entries, as well those made by the party against himself as those for himself. Otherwise great injustice might arise by reading or proving what a party may have admitted and excluding what he said or wrote at the same time or on the same subject, which would have explained the true meaning of what he said or wrote.

The court therefore erred in refusing to permit appellant to read from the book of accounts the items or entries which he offered to read, made in the same book from which appellee had read extracts, and the errors were prejudicial to appellant.

Exceptions were taken to the ruling of the court by appellant in refusing to give instructions to the jury as asked by him, but we deem it unnecessary to go into an investigation of the propriety of the rulings of the court below in giving and refusing instructions as the judgment must be reversed for the cause stated, and upon the return of the cause the court below should transfer it to the equity docket and refer the accounts of the parties to the master to audit and state the same from the proof already taken and such other proof as the parties respectively may offer and report the result of his investigations to the court.

We forbear to express any opinion as to the merits of the controversy on either side, since both parties seem determined to go behind such evidence as might indicate an adjustment on all

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these complicated accounts by the parties themselves, and to have a judicial investigation of the same.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent with the principles of this opinion.

James, W. R. Bradley, Kingman, for appellant.

Tyler, Roalhac & Lauderdale, for appellee.

U. T. MERRETT *v.* JOHN MOSS.

Execution—On Replevin Bond—Void Judgment—Sale Void.

If a judgment and the execution thereon are void, that execution gives to the sheriff no authority to take a replevin bond, and it can not be made the basis of another execution. A sale under an execution on such replevin bond is void.

APPEAL FROM LINCOLN CIRCUIT COURT.

June 11, 1869.

OPINION BY JUDGE HARDIN:

This was an ordinary action for the recovery of a tract of about 172 acres of land, as the property of the appellee and of which he alleged the appellant was wrongfully in possession.

The defendant by his answer denied that the plaintiff had title to the land or any right of recovery.

The cause having been removed by change of venue to the Lincoln circuit court, was there tried, and the trial resulted in a verdict and judgment for the plaintiff, which the court refused to set aside on a motion for a new trial and the defendant has appealed to this court.

It was proved on the trial that for many years before the 15th day of December, 1862, the plaintiff was the owner and in the possession of the land, and that the defendant was in possession at the time of the institution of the suit, but it was also found that on said 15th day of December, 1862, the sheriff having levied several executions on the land, one of them in favor of John B. Tilford against the appellee, and John H. Hanley, purporting to have been issued on a replevin bond given to replevy

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and execution issued upon a judgment against them in the Jessamine circuit court, for \$1,946.16 and interest. The land was sold by the sheriff and purchased by Philip Rarick and Milton C. Smith for \$2,677.50, and the sheriff conveyed the land to Rarick and Smith on the 24th of January, 1863, and they conveyed it to the defendant Merrett on the 24th of March, 1863. To prove these facts the deeds and transcripts of the suits of Tilford and others against Moss and others were produced.

But the record of the suit of Tilford did not contain a copy of either a summons against Moss, or the supposed replevin bond of himself and Hanley and there was a contrariety of parol evidence which the court admitted, as to the existence and loss of these papers, and whether any summons was in fact ever served on Moss.

Facts and circumstances were also proved conducing to show that before the sale of the land about \$2,000.00 of the debt to Tilford was paid by Hanley to the sheriff who, nevertheless, made the sale to satisfy the execution without regard to this payment and on the other side there was evidence before the jury tending to a different conclusion.

In two instructions given at the plaintiff's instance, and to which the defendant excepted, the jury were substantially told that if they believed from the evidence that no summons in the suit of Tilford against Moss and Hanley was served on Moss, then the judgment in the case, and all subsequent proceedings thereunder were void so far as he was concerned, and formed no obstruction to the plaintiff's recovery.

The court gave to the jury another instruction *sua sponte* based on the evidence as to the payment by Hanley, but as this was not excepted to, it need not be further noticed.

In the very elaborate argument of counsel in this case, various minor points, and some irrelevant considerations have been urged, particularly in support of the judgment, but the main and controlling question, as we conceive, is whether the court erred in giving the instructions predicated on the evidence respecting the service of process on the appellee.

It is too well settled to require the citation of authority that a personal judgment without service of process or appearance, is

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absolutely void, and generally all subsequent proceedings under such a judgment are also void.

But it is insisted for appellant that if it be true that the appellee replevied the debt, although it may have been upon an execution issued on a void judgment, the sale and conveyance made under an execution on the land were valid, and the instructions, which were hypothecated, alone on the evidence as to the service of the summons, were therefore misleading and erroneous.

But if the judgment and the execution thereon were void, as to Moss, as they certainly were if he was not before the court when the judgment was rendered, the execution gave the sheriff no authority to take the replevin bond, and it could not be made the basis of an execution.

By the first section of article 9 of chapter 36, Revised Statutes, it is provided that defendants (except in certain cases) may replevy judgments when there is no execution thereon, in the hands of a collecting officer. And it is further provided by the second section of said article that an execution on a judgment which could have been so replevied in the hands of the officer.

But these provisions of the statute relate to judgments which have some validity or unfavorable character and not to mere void entries on the records of a court which are not legally enforceable as judgments. *Richardson, etc., v. Bartley, etc.*, 2 B. Monroe 328; *Ditto, etc., v. Goehegan, etc.*, 1 Metcalf 169; *Same v. Same*, 2 Metcalf 433.

Whether the appellee might not have estopped himself from questioning the validity of the appellant's claim acquired under the sale, by inducing or sanctioning the sale or subsequent conveyances in writing or otherwise is a question which need not be here considered, as we are satisfied the mere execution of the replevin bond did not constitute such an estoppel, and there is no evidence of any other act on the part of the appellee, which could have had that effect.

It does not appear to us therefore that the instructions given at the plaintiff's instance were erroneous.

The jury were not restricted in their finding to the single question whether there was service of process on the appellee, but were authorized to find for him if they believed from the evidence that the sale was made for part of the debt of Tilford

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which had been paid to the sheriff, as in that event the sale was for more land than was necessary to pay the debts, and in this point we do not perceive that there was such a preponderance of the evidence against the verdict as would authorize a reversal on that ground.

Wherefore the judgment is affirmed.

Durham & Jacobs, Dunlap, Owsley & Burdell, for appellant.
Bradley, for appellee.

P. MAROMAN'S ADMR. V. MARTHA A. BUNTING.

Property—Stock in Railroad Is Realty—Descent and Distribution.

The capital stock in a railroad corporation is realty and descends to the heirs at law of the original owner, and they are entitled to hold same and enjoy the profits, in the way of dividends, arising from such estate as against the personal representatives.

APPEAL FROM BULLITT CIRCUIT COURT.

September 16, 1871.

OPINION BY JUDGE LINDSAY:

At the time the appellant procured to be issued to him as administrator *de bonis non* of his deceased father the certificates of stock in the Louisville & Nashville Railroad Company, such stock in law was realty and was so held and treated by the courts.

Upon the death of his father this stock descended to him and his brothers and sisters.

It is true it was all the while liable to be subjected to the payment of the appellee's judgment by proper proceedings in a court of competent jurisdiction. But, like other realty, until so taken and sold, the heirs at law of the original owner were entitled to hold and possess the muniments of their title, and to enjoy the profits in the way of dividends arising from such estate.

It was therefore error to subject the accrued dividends in the hands of the appellant to the payment of appellee's judgment. Such dividends in law belong to the appellant and his brothers and sisters.

Opinion of the Court.

It appears from the record that none of the heirs of the decedent except the appellant were before the court upon the appellee's petition. For this reason it was error to adjudge a sale of the stock. The purchaser will not secure a perfect title, as the heirs not before the court can, notwithstanding the judgment, assert title as against him.

The record does not justify the conclusion that appellant in securing the certificates of stock acted in such bad faith, as to forfeit all claim to credit on account of the expenses necessarily incurred by him in the transaction through which the same were secured.

It seems the services of his attorneys were necessary, and that the fee paid them was not unreasonable.

Appellant and his co-heirs were by law entitled to have the certificates of stock issued to them. And when the appellee subjects it in their hands to the payment of her judgment she can not complain at being required out of its proceeds to pay a fair proportion of the expense necessarily incurred in getting the evidence of title perfected, and the court below should have required her to do so.

The costs of the litigation arising upon the original petition of appellee should be paid out of the proceeds of the property sold, and not taxed against the appellant.

For the reasons set out the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Thompson, for appellant.

R. H. Field, for appellee.

BENJ. H. LAWRENCE, ETC., *v.* H. C. MIDDLETON.

Reformation of Instruments—Deed to Describe Property.

The grantee in a deed is entitled to have the deed so reformed as to correctly describe the property intended to be conveyed thereby.

Trusts—Conveyance of Land in Trust—Grantor Has No Interest in the Execution of the Trust.

The conveyance to the trustees for the benefit of Mrs. Lawrence divested the grantor of all interest in the trust property, and under

Opinion of the Court.

the same she cannot claim to have any interest, either legal or equitable, in the execution of the trust.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 17, 1871.

OPINION BY JUDGE LINDSAY:

It is satisfactorily established by the pleadings, exhibits and proof that appellee was entitled to have the deed under which he claims title so reformed as to correctly describe the property intended to be conveyed.

The conveyance from May and Gray to H. W. Gray and others, trustees for Mrs. Selina Lawrence, divested the grantor of all interest in the trust property, and under the same she could not claim to have the slightest interest, either legal or equitable, in the execution of the trust. In addition to this, the trustees were empowered to sell and convey the trust estate at their discretion. Under such a state of case the statute of 1820 does not apply. *Butler v. Miller*, 15 B. Monroe. Bottom page 494.

Judgment affirmed.

Bodley & Sumrall, for appellants.

Bullock, Anderson & Weissenger, for appellee.

JACKSON MCGUIAR v. JASON NEELY.

Trespass to Try Title—Compromise Line—Infants and Feme Coverts.

The compromise line established by the remote vendors of appellee and the vendor of Mrs. Roby and her trustee, did not bind either her or her children, she being a feme covert and the children infants.

APPEAL FROM SIMPSON CIRCUIT COURT.

October 31, 1871.

OPINION BY JUDGE LINDSAY:

The compromise line established by G. W. Hay, the remote vendor of appellee, and Karr, the vendor of Mrs. Susan Roby, and J. W. Roby, her trustee, did not bind either her or her children, she being a feme covert, and the children infants.

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Karr by his conveyance had divested himself of all interest in the land, and J. W. Roby was merely the holder of the legal title with no power to divest Mrs. Roby and her children of any portion of their estate.

Appellee McGuiar held all the land Mrs. Roby and her children had the right to convey, and was not estopped to claim to the boundaries mentioned in his deed by reason of the inoperative compromise between Hogg, Karr and Roby, the trustees.

The court below by Instruction No. 1, given at the instance of the appellee, made this compromise conclusive as to the rights of the litigants, and took away from the jury the right to make any inquiry as to the location of the true division line between these litigants.

For this error the judgment must be reversed, and the cause remanded, for a new trial and for further proceedings not inconsistent with this opinion.

Milliken & Whiteside, Bush, for appellant.

Craddock, Trabue, for appellee.

SAMUEL LUCKETT v. W. P. HERNDON.

Specific Performance—Action to Enforce—Answer—Sufficiency of.

Appellant states, in his answer, that he has no knowledge or information sufficient to form a belief as to whether or not the title of appellee is good and perfect, and complains that he has never made an exhibition of his title. He does not point out specific defects in appellee's title nor does he call upon him for an exhibition of such title. He should either have denied his ability to convey in pursuance to his title bond or demanded an exhibition of his title, or else he should have pointed out specific defects in same.

APPEAL FROM FRANKLIN CIRCUIT COURT.

October 19, 1871.

OPINION BY JUDGE LINDSAY:

The answer of Luckett was not such as to put Herndon upon an exhibition of his title. He alleges in his petition that he holds the legal title to the land described in the bond, that he

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is able to convey according to his bond, and tenders a conveyance.

Appellant contents himself with stating that he has no knowledge or information sufficient to form a belief as to whether or not the title of appellee is good and perfect, and complains that he has never made an exhibition of his title. He does not point out specific defects in appellee's title, nor does he call upon him for an exhibition of such title. He should either have denied his ability to convey in pursuance to his bond or demand an exhibition of his claim of title, or else he should have pointed out specific defects in such claims. As to the counter-claim, the evidence is conflicting. Both parties seem to have violated their agreement with regard to the right of Lockett to pass through the farm of Herndon. Although Herndon, under the pleadings, could not set off his claim for damages on this account against that of Lockett, still he might excuse his conduct by showing that Lockett persistently violated the contract by hauling through his land during wet weather.

All the evidence on this branch of the case being considered, we do not think appellant sustained his claim for damages. If the lien held on the land by Lewis had not been discharged as before mentioned, Lockett should have alleged that such was the fact.

Judgment affirmed. Chief Justice Pryor did not sit in this case.

James, for appellant.

Rodman, for appellee.

RALPH MATTINGLY'S ADMR. v. GEORGE W. GRAVES.

Reformation of Instruments—Correction of Deed—Warranty.

Where land is sold at public auction and it is announced by the auctioneer that it is sold subject to a dower interest, the purchaser has no right to have the deed reformed so as to contain a warranty of title, in order that he may recover thereon.

APPEAL FROM MARION CIRCUIT COURT.

October 14, 1871.

Opinion of the Court.

OPINION BY JUDGE PRYOR:

The opinion heretofore rendered in this case was not a final adjudication of the rights of these parties.

The appellee, E. N. Mattingly, regarded his answer as a counter-claim, and insisted upon the hearing in this court that as the appellant, Graves, had failed to controvert it by a reply, it should have been taken as confessed. This court, in the opinion; says, "that as the answer was not made a cross-petition against the widow and heirs of Ralph Mattingly, who, as well as the plaintiff, would have been necessary parties to a suit to correct the deed, and as exoneration from liability on the warrants was the relief sought, it should have been, in our opinion, treated as an answer, setting up affirmative matter of defense only. But as the parties, if not the court, may from the ambiguous form of the answer have misconstrued it, it will be proper on the return of the cause to allow amended or other appropriate pleadings filed and further preparation to be made. And to enforce the warranty of Ralph Mattingly as to any available assets of his estate the plaintiff should be permitted to amend as to make the personal representative and heirs defendants."

The answer of E. N. Mattingly was amended on the return of the case and made a cross-petition against the widow and heirs, and proof taken as to the alleged mistake in the deed. The proof is conclusive that the land, unincumbered by Mrs. Mattingly's potential right of dower, would at the sale have brought fifty dollars per acre. Many persons present at the sale state that it was publicly announced by the auctioneer that it was sold subject to this right of dower. Graves, the purchaser, so understood it, as it is clearly proven by his statement to others. The lawyer who wrote the deed says that E. N. Mattingly when in his office to have the deed written was advising Graves to buy the dower, and that the reason he omitted the clause of warranty in the deed was because of the usual practice to do so. This proof is all uncontradicted in any way except by the reply of the appellee Graves to the cross-petition of E. N. Mattingly. There is no doubt but what the land was sold subject to the dower, and that the appellee Graves is not entitled to recover on the warranty.

Opinion of the Court.

The court below adjudges that the warranty was inserted by mistake and that the sale was made subject to Mrs. Mattingly's potential right of dower, but nevertheless proceeds by the judgment to make the estate of R. Mattingly liable upon the warranty. It is difficult to conceive how this liability could exist if the warranty was inserted by mistake, and formed no part of the contract.

If the court determines, as it has properly done, that the warranty was not a part of the contract and should be eliminated from the deed or the deed made to conform to the real contract between the parties, it necessarily adjudges that the appellee Graves has no cause of action. The judgment, for the reasons indicated, is reversed on the original and affirmed on the cross-appeal, and remanded, with directions to the court below, to dismiss the appellee's petition and for further proceedings on the answer and cross-petition of E. N. Mattingly not inconsistent with this opinion.

Harrison, for appellant.

Lisle, for appellee.

JOHN E. NEWMAN v. NATHANIEL WICKLIFFE'S EXR., &C.

Receivers—Fund in Court—Liability on Bond—Limitation.

The bond executed by appellant as surety of the receiver was not made payable to any particular person, but it is in substance and effect a bond payable to the commonwealth for the use of the parties named in the bond. This sum had been paid into court and the parties involved in the litigation were each asserting claim to it.

The cause of action against the appellant did not accrue until the rendition of the judgment ascertaining the parties entitled to it, and such is, in effect, the terms and conditions of the bond.

APPEAL FROM NELSON CIRCUIT COURT.

October 24, 1871.

OPINION BY JUDGE PRYOR:

In a suit in equity pending in the Nelson Circuit Court between W. A. Grigsby, as plaintiff, against N. Wickliffe's executor and C. A. Wickliffe, defendant, the latter paid into court the

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sum of \$230.30, and this sum was by an order of court directed to be paid over to W. R. Grigsby, who was appointed receiver in the case, and required to execute bond with the appellant, John E. Newman, as his surety, conditioned to have said money with its interest forthcoming to abide any future order of the court which may be made in the case of W. R. Grigsby against N. Wickliffe's executor and C. A. Wickliffe, which bond was duly executed and the money paid over to the receiver in open court. This bond is as follows:

"Be it known C. A. Wickliffe this day paid into court two hundred and thirty dollars and thirty cents in discharge of his bond given in the case of N. Wickliffe and W. R. Grigsby against Martin Foreman, and W. R. Grigsby was thereupon appointed receiver to loan out said sum, and have the same and its accruing interest forthcoming, and to abide any order and decree that may be hereafter made in the suit of *W. R. Grigsby v. N. Wickliffe's Admr. and C. A. Wickliffe*. In the due and proper performance of which duty the said Grigsby and J. E. Newman as surety hereby bind and obligate themselves this 13th of June, 1857."

Grigsby, the receiver, never loaned out this money, but retained it in his own hands.

On the 6th of October, 1869, on motion of Nathaniel Wickliffe's executor a rule was awarded against W. R. Grigsby and the appellant, John E. Newman, to show cause why they should not pay into court the sum of \$230.30, with interest, being the amount of the bond executed by the said Grigsby as receiver on the 13th of June, 1857.

The appellant, Newman, responds to this rule, and as a defense insists, first, that the bond is void for the reason that it is not made payable to any particular person or to the court; second, that the bond never was delivered by the principal, or approved by the court, and, lastly, that the right of action or proceeding by rule existed more than seven years prior to the date at which the rule issued, or the commencement of the proceedings against him.

On the hearing of these issues the court adjudged that Grigsby and the appellant, Newman, as his surety, pay into court on or before the third day of the next term of the court the

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sum of \$230.30, and interest from the 13th of June, 1857, to abide the further order of the court, and from the order the appellant, Newman, prayed an appeal.

This suit as between W. R. Grigsby and N. Wickliffe's executor was finally determined in the month of November, 1870, and by the judgment rendered between these parties it was ascertained that W. R. Grigsby was entitled to a part of the fund in his hands, and the rule was so modified by that judgment as to require the appellant to pay over to N. Wickliffe's executor and C. A. Wickliffe's executor—he having died during the pendency of the suit—the amounts therein adjudged to them, and the balance W. R. Grigsby is permitted to retain, and for which the appellant is not held liable. The appellant, Newman, also appeals from this judgment.

The bond executed by appellant as surety of Grigsby is not made payable to any particular person, but it is in substance and effect a bond payable to the commonwealth for the use of the parties named in the bond. This fund had been paid into court, and the parties involved in the litigation were each one of them asserting claim to it.

It was the duty of the court to loan this fund out and place it in the hands of a receiver for that purpose. Grigsby was appointed the receiver and as such was liable for the money. No bond could well have been executed to any of the parties interested in the suit, as the court had not determined who of the parties were entitled to receive it. The fund was in court, the court could alone control it, and the bond of appellant obligated him with his principal to have this money forthcoming to abide any order or judgment that might be made in the case. The suit was undetermined and no party connected with the case could have collected by execution or by any motion in court, have required it paid over to them. The court alone could order this money paid, and the principal and surety were each bound and liable by the express terms of the bond to have the money and its interest forthcoming to abide any order or decree made in the case.

The twelfth section of Chapter 97, Revised Statutes, page 400, provides that, "a surety in any bond given in the course of any judicial proceeding should be discharged from all liability

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unless suit be brought thereon within seven years after the accruing of the cause of action."

The judgment determining the rights of these parties was not rendered until November, 1870, and with this judgment they were in no condition to require the payment of this money to them by the receiver. The object and purpose of placing this money in the hands of a receiver and taking bond from him was that this fund in court might be secured with its interest to the party entitled to receive it.

The cause of action against the appellant did not accrue until the rendition of the judgment ascertaining the party entitled to the money, and such is in effect the terms and conditions of the bond upon which this proceeding was instituted. *Barbee v. Pitman*, 3 Bush 260.

The court had the right to have the whole of the fund paid into court for the purpose of having the same paid over to the parties entitled, and, although Grigsby may have been entitled at the time the rule issued to a portion of the money, still he was compelled under the order to bring the money into court in order that a proper distribution of the fund might be made.

The judgment rendered in the case required the appellant to pay a less sum than the amount required to be paid under the rule, and he has no cause to complain of the judgment.

We perceive no error in the judgment prejudicial to the appellant and the same is now affirmed.

Newman, James, for appellant.

Muir & Wickliffe, for appellees.

MILLETT, &C., v. JOHN B. McGEHEE, RECEIVER.

Landlord and Tenant—Lien for Rent Cumulative or Ancillary.

Although appellee had a preferred lien on the goods in the house, as landlord, for the rent, still he might waive that lien and enforce the collection of his debt, as creditor, by an ordinary action. The lien secured to landlords is merely cumulative or ancillary.

APPEAL FROM FULTON CIRCUIT COURT.

October 9, 1871

Opinion of the Court.

OPINION BY JUDGE PETERS:

Although appellee had a preferred lien on the goods in the house as landlord for the rent, still he might waive that lien, and enforce the collection of his debt, as creditor, by an ordinary action—the lien secured to landlords is merely cumulative or ancillary—but he is not bound to pursue the enforcement of his lien, and if he chooses to waive it, it is not perceived how the tenant in this case was prejudiced; he had his choice of his mode of collecting his debt; the answer presented no defense to the action and the demurrer was properly sustained.

The motion to affirm as a delay case must be sustained. Judgment affirmed.

———, *for appellant.*

Randle & Tyler, for appellee.

U. T. MERRIT v. JOHN MOSS.

New Trial—Newly Discovered Evidence to Impeach Witness.

New trials will not be granted upon the discovery of testimony, either oral or written, tending merely to impeach a witness or to show that he was mistaken in his statements.

APPEAL FROM GARRARD CIRCUIT COURT.

June 15, 1871.

OPINION BY JUDGE LINDSAY:

Appellant relies upon two grounds for the vacation of the judgment against him in favor of appellee Moss.

First. The discovery of a receipt from the sheriff, Rutherford, to J. H. Hanley, which shows that the witness, M. C. Hanley (now dead), was mistaken in his statement, that he as agent for his father, J. H. Hanley, who was jointly bound with Moss in some of the debts under which his land was sold, had made large payments on said debts for which no credits were entered on the executions.

Second. The discovery of the record and judgment in the suit between his vendors, Rarick & Smith, plaintiffs, and Ap-

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pellee Moss, defendant, which judgment settled the rights of the parties litigant to the land in controversy, and which, if pleaded, would have operated as a bar to Moss's right to recover in this action.

New trials will not be granted upon the discovery of testimony either oral or written tending merely to impeach a witness or to show that he was mistaken in his statements.

The newly discovered testimony must be calculated of itself, to establish a state of facts different from that proved when the judgment was rendered.

Upon the trial M. C. Hanley swore that he, as agent for his father, paid to Rutherford, sheriff of Jessamine county, something over two thousand dollars on the Tilford execution, and took his receipt therefor. Rutherford, whose deposition was taken by appellant, swore positively that M. C. Hanley had made no such payment.

The discovered receipt is for the sum of over \$3,900, and is for money paid upon other debts for which J. H. Hanley was liable. Rutherford is again sworn after the discovery of the receipt and states that it is the only one he ever gave to M. C. Hanley as agent for his father, J. H. Hanley.

The two witnesses still contradict each other flatly, and the discovered receipt, which it is insisted proves conclusively that Rutherford is right, makes no mention of the transaction, about which the witnesses differ, and can be entitled to no weight whatever, unless the statement of Rutherford that it is the only receipt he ever gave to M. C. Hanley, agent, etc., is to be believed, notwithstanding the latter swore when examined that he distinctly recollected paying two thousand dollars on the Tilford debt, and taking Rutherford's receipt therefor. Upon the trial the jury accepted Hanley's testimony as true, and must have based that verdict upon it. Possibly the production of the \$3,900 receipt might have produced a different result, but we are of the opinion that the probabilities in favor of that conclusion are not great enough to authorize the granting of a new trial.

So far as the judgment against Moss in the suit of Rarick & Smith is concerned, we are satisfied from the record that Merrit was apprised of its existence at the time of the former trial.

Opinion of the Court.

We are of opinion that the Circuit Court properly dismissed appellant's petition.

Judgment *affirmed*.

Owsley & Burdett, Vanwinkle & Fox, Dunlap, Durham & Jacobs, for appellant.

Bradley for appellee.

R. H. LANSDALE v. F. B. WEBB, &C.

Appeals and Errors—Rule to Pay Money Into Court Made Absolute—Final Order.

Where a rule against a party to pay money into court is made absolute and an attachment issued thereon, is a final order in the case and may be appealed from.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 30, 1871.

OPINION BY JUDGE LINDSAY:

Upon the filing of the mandate of this court in September, 1853, it was made the duty of the chancellor to ascertain whether or not the purchaser at the decretal sale had received possession of the ferry under his purchase, and if so to require him to pay a reasonable rent for it during the time it was in his possession, before rendering a judgment setting aside the commissioner's sale, and canceling the purchaser's bonds.

For this purpose the cause was referred to the commissioner of the Chancery Court.

On the 17th of March, 1854, the commissioner filed his report, in which he fixed the rents of the ferry, with accrued interest thereon, at the sum of \$2,492.42. To this report appellant Lansdale filed exceptions on the 5th of May. The said report was approved and confirmed. On the 19th of May, 1854, on motion of C. D. Shean, the cause was again referred to the commissioner. June 30th, the commissioner filed a second report to the effect that no additional facts had been developed. On the 11th of June, 1858, appellant Lansdale was ordered to pay into court the amount reported by the commissioner as due from him on or before the 25th of that month or to show cause to the

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contrary. From this order he prayed an appeal to this court, which seems never to have been prosecuted.

On the 25th of June the rule against Lansdale was made absolute, and an attachment ordered to issue against him.

This was certainly a final order in the matter. It fixed the rights of the parties and the liability of Lansdale. It has never been modified, vacated, annulled or reversed.

The subsequent proceedings in the cause have been upon orders of attachment issued for the purpose of enforcing this order, and the only error that we can perceive in the record is that Lansdale has been permitted by the leniency of the chancellor to escape, for thirteen years, the payment of the amount for which he was adjudged liable.

The order from which this appeal is prosecuted is nothing more than an order enforcing a former judgment of the chancellor, and it is therefore necessarily correct. The plea of limitation was not available. No objection was taken to the action of the special chancellor in the court below. It does not appear that appellant objected to his making orders in the cause without being sworn. The objections now urged can not be raised in this court for the first time.

We can not upon this appeal inquire into the merits of the judgment rendered in 1858.

Judgment affirmed.

Thompson, A. H. Field, for appellant.

Pirtle & Caruth, for appellee.

J. M. LESTER v. THOMAS C. WINFREY.

Judgment—Interlocutory Judgment May Be Disregarded by Court.

A judgment can not be final merely because it decides some question of law or fact relating even to final relief, not merely because it decides what are the rights of the parties as to such relief. An interlocutory judgment may be entirely disregarded by the court when the final judgment is rendered.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

October 31, 1871.

Opinion of the Court.

OPINION BY JUDGE PRYOR:

There has been no such final order or judgment rendered in this case by the court below, as will authorize an appeal to this court.

The order or judgment appealed from is merely an opinion expressed by the court to the effect that the appellee is in a condition to make the appellant a good title. The title has not been made or required to be accepted by the appellant, and no judgment rendered against him for any of the purchase money. "A judgment can not be final merely because it decides some question of law or fact relating even to final relief, not merely because it decides what are the rights of the parties as to such relief." *Bonderant v. Appersom*, 4 *Metcalf* 30. The order from which this appeal is prayed may be entirely disregarded by the court when the final judgment is rendered. The appeal for the reason given is dismissed.

Garnett, Winfrey, for appellant.

James, for appellee.

JAMES LANE'S HEIRS V. JOICEY SHEARER, &C.**Descent and Distribution—Advancements—Value of Dower to Be Deducted.**

The decedent advanced to his daughters a tract of land each in which the widow claims dower. In the settlement of the estate the value of the dower should be deducted from the price of the land with which the daughters are charged as an advancement.

Descent and Distribution—Property Sold to Husband Can Not Be Charged to Wife.

The fact that the father kept an account of advancements and failed to charge his daughter with this sum of money for property he had let her husband have, is conclusive that it was not given to the daughter, but sold to the husband and she should not be made to account for it.

APPEAL FROM CLARK CIRCUIT COURT.

October 7, 1871.

Opinion of the Court.

OPINION BY JUDGE PRYOR:

James Lane in his lifetime made advancements to his children, an account of which he kept, showing the amount, kind, and value of the property he had given to each one of them.

He had advanced to his two daughters, Mrs. Shearer and Mrs. Collins, a tract of land each, valued at ten dollars per acre. The tract conveyed by him to Mrs. Collins contained 149 acres, and the tract conveyed to Mrs. Shearer contained 90 acres. After the death of James Lane, his widow, who was his second wife, claimed dower in the land conveyed to these two daughters, she not having signed the deed made by her husband or relinquished her dower in any way. In these consolidated causes of *Fielding Lane v. J. Shearer, &c.*, and *Collins and wife v. Henry et al.*, these two daughters allege that they have been compelled to pay the widow for her dower in these lands, and that in a settlement of the estate of James Lane, their father, in making the charge against them for advancements, there should be deducted the value of the widow's dower in the lands conveyed to them, or the amount they have had to pay the widow for the same.

These suits involve the settlement of the estate, and a distribution between the children, and we see no reason why the value of this dower should not be deducted from the price of this land with which they are charged. They were deprived of a part of the property they received as an advancement, and it is but equitable and proper that they should not be charged with it.

Mrs. Shearer was credited by the sum of \$245, and Mrs. Collins by the sum of \$320, that is, these sums were deducted from the price with which they were charged for the same and were the amounts paid the widow for her dower, and as it produces an equity in the distribution of the property between all the children, this court will not disturb it.

This land given to the daughters was valued at ten dollars per acre by the donor, their father, and this valuation must control. The reason James Lane, the father, assigned for fixing the value of the land to Mrs. Collins at ten dollars per acre was that his other children had the use of what he had given them

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for several years, whilst he had given to Mrs. Collins up to that time but a small portion of his estate. Mrs. Shearer should not have been charged with interest on the note executed for the purchase of the property by her at the sale, as it was coming to her as one of the children, and was, in fact, her part of her father's estate.

The other children obtained their part of the estate at the same time, and she was certainly entitled to receive her portion also.

The commissioner acted properly in refusing to charge Mrs. Shearer with the sum of \$740, alleged to have been advanced to her by her father and not charged. The fact that the father kept an account of advancements and failed to charge his daughter with this sum of money for property he had let her husband have is conclusive that it was not given to the daughter, but sold to the husband; at any rate, the daughter should not be made to account for it.

The attempt to make Mrs. Shearer responsible for this \$740, as an advancement, and the effort to set aside the deeds to the two daughters for the alleged reason that the father was incompetent to execute such instruments seems to have been induced by the effort on the part of the two daughters to lessen the amount of the advancements made to them by reason of the widow's claim for dower. The father at the time of the execution of these deeds had capacity sufficient to understand and know what he was doing. The commissioner's report charges all the children with the advancements made to each, and in the distribution of the assets each child is made equal, and none of them ought to complain. We perceive no error in the judgment of the court below and the same is now *affirmed*.

Eginton, for appellants.

Simpson, for appellees.

ROBERT MCALLISTER v. A. J. COCHRAN.**New Trial—Action For—Grounds of Defense Must Be Stated.**

The petition in an action for a new trial must state the grounds of defense so that it may be determined from the pleading whether or not the newly discovered evidence is material.

Opinion of the Court.

APPEAL FROM GREENUP CIRCUIT COURT.

October 21, 1871.

OPINION BY JUDGE LINDSAY:

Appellant fails in his petition to state the issues involved in the action in which he seeks a new trial. We can gather that at the September term, 1869, of the Greenup Circuit Court appellee recovered against him a judgment for the delivery of a roan horse, or its value, one hundred and thirty-five dollars. But as to the nature of appellee's claim of title or appellant's grounds of defense the whole matter is left entirely in the dark.

It is therefore impossible from the pleading to determine whether or not the newly discovered testimony is material. Appellant claims that it is, but such claim is a legal proposition, and not the statement of a fact. Such being the case, we can not adjudge that the Circuit Court erred in sustaining appellee's demurrer.

It does not appear that appellant offered to amend. He therefore was not prejudiced by the dismissal of his petition. The injunction was properly dissolved.

Judgment affirmed.

G. E. Roe, for appellant.

———, *for appellee.*

WILLIAM T. MCNEES v. J. J. PARRISH.**Set-Off and Counter Claim, Action on Contract.**

By the terms of the contract McNees agreed unconditionally to pay for the completion of the building the sum of \$2,500.00. No mention is made of any claim set up, or to be set up by him for old lumber or brick sold prior to that time by the original contractor.

APPEAL FROM HARRISON CIRCUIT COURT.

June 16, 1871.

OPINION BY JUDGE LINDSEY:

By the terms of the contract executed on the 29th of March, 1869, McNees agreed unconditionally to pay for the completion

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of the building the sum of two thousand five hundred dollars. No mention whatever is made of any claim set up, or to be set up, by him for old lumber or brick sold prior to that time by the original contractor, Dill. It follows therefore that he could not successfully assert any such claim as a set-off in this action, even if it be conceded that Dill and Parrish were partners, without alleging and proving that upon a settlement of their partnership there would be a balance due to Dill, which amount he might have been allowed to retain on account of any debt owing by Dill to him. But the pleadings raise no such issue, and therefore his claim on account of said old brick was properly disallowed.

The court properly excluded the deposition of Dill. Although he may have had no real interest in the controversy, he was a party to the contract, and was liable to McNees for costs. His evidence being excluded, the credit to McNees on account of the claim of Shannon & Co. cannot be disturbed. The answer of Dill makes him a party to this suit, and hence the judgment is upon him. For this reason McNees cannot be prejudiced by the failure of Parrish to join Dill with him as a co-plaintiff.

Judgment *affirmed* on both original and cross-appeal.

Trimble, for appellant.

Cleary & West, for appellee.

S. A. LEE v. G. W. DAVIS.

Contracts—Work and Labor—Abandonment—Quantum Meruit—Damages.

Where one undertakes, for a consideration paid or to be paid by another, to perform work and labor, or to fulfill a contract by the performance of services and before the contract is completed abandons the work, he is entitled to recover upon a quantum meruit the value of his labor performed, less the amount of damages the other party has sustained by reason of his failure to comply with the contract.

Contracts—Failure to Perform—Forfeiture.

The object of the forfeiture or its being made a part of the contract, was to insure its fulfillment, and when this is the case and the party seeking the forfeiture has his remedy to recover damages by suit, the forfeiture which amounts to a penalty only can not be enforced.

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Contracts—Implied Promise to Pay.

A party violating a contract may assert his claim for services, not upon the contract, but upon the implied promise to pay what his services were reasonably worth.

APPEAL FROM McLEAN CIRCUIT COURT.

November 8, 1871.

OPINION BY JUDGE PRYOR:

The rule of law applicable to a case like this is, that where one undertakes for a consideration paid or to be paid by another to perform work and labor, or to fulfill a contract by the performance of services and before the contract is completed, abandons the work, he is entitled to recover upon a quantum meruit the value of his labor performed, less the amount of damages the party has sustained by reason of the failure upon the part of the party agreeing to perform the work to comply with the contract.

In this case the proof conduces to show that the appellee had the right to abandon the contract, and whether he did or not under the instructions given by the court the jury was told that if the appellee had violated his contract the defendant was entitled to damages therefor to be credited on appellee's claim for services. This was in substance the law of the case. It is true that by the contract the appellee, if he failed to comply with its terms, was to forfeit all right to recover for what services he had rendered, still when the appellee violated his agreement and refused to work the year the appellant could have resorted to his action and have been fully compensated in that way for the damages he had sustained.

The object of the forfeiture or its being made a part of the contract was to insure its fulfillment, and when this is the case and the party seeking the forfeiture has his remedy to recover damages by suit, the forfeiture, which amounts to a penalty only, cannot be enforced.

The party violating the contract may assert his claim for services not upon the contract, but upon the implied promise to pay what his services were reasonably worth. *Foster v. Watson*, 16 B. Monroe 377.

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In this case, however, it is not so clear that the appellee was in the wrong, and really the instructions are more prejudicial to him than the appellant. There was no proof that the appellee killed the horse, or that it died whilst in his possession. He should not be made to account for his value, as by the contract the title to the horse could not have vested in the appellee until he had complied with its terms. The judgment of the court below is *affirmed*.

Turner, for appellant.

Johnson, for appellee.

LEWIS MAYO'S HEIRS v. DANIEL HAGER.

Trust—Subsequent Purchaser—Notice of Prior Sale—Resulting Trust—Statute of Frauds—Parol Evidence.

A subsequent purchaser of land with notice of a prior sale is a trustee and holds subject to the prior equity. The statute of frauds does not apply to resulting trusts and the trusts will be enforced though evidenced by parol alone.

APPEAL FROM JOHNSON CIRCUIT COURT.

October 26, 1871.

OPINION BY JUDGE HARDIN:

At the death of James Hayden he left surviving him several children, the most of whom were infants. He owned a tract of land in Johnson county, that decended to these children, and a man by the name of Thomas V. Calhoun seems to have acquired an interest in the land, whether through his wife, or by purchase, does not appear.

The appellee, David Hager, brought this suit in equity against Calhoun in which he alleges, "that he purchased of him in the year 1848, this tract of land known as the Evans farm; that Calhoun sold him not only his own interest, but the interest of all the infant heirs of James Hayden, deceased, for whom he was guardian at the time; that he took possession at once of said land under his purchase and has held it ever since, and made valuable improvements thereon. He alleges that the heirs have all made title to the land except Virginia Haunt, who was

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a daughter of James Hayden; that he has paid to the defendant, Calhoun, the purchase money for the interest of Virginia Haunt in this land and that Calhoun has obtained a deed executed by Virginia Haunt, to him, Calhoun, for her interest, and although he has acquired the legal title, now refuses to make the same to him."

Hager afterwards filed an amended petition in which he alleges, "that he had purchased and paid to Calhoun for all the shares in the land except that of Hugh Hayden, who is an infant and that said Calhoun has conveyed or caused to be conveyed to him, Hager, all the shares so bought and paid for, except the interest of share of Virginia Haunt and her husband; that Calhoun agreed and promised to have said share conveyed to the plaintiff, Hager, but that he had obtained the deed from Mrs. Haunt to himself, and had sold and conveyed the interest of Mrs. Haunt in the land to Louis Mayo. That Mayo knew at the time of his purchase, that he, Hager, had bought the land of Calhoun and was in possession, and had full knowledge of his equity." He asked that the title be surrendered to him. Mayo answers and admits the purchase, alleging that Calhoun told him he had made no sale of it to Hager, but also admits that Hager informed him that he had bought this land of Calhoun before Calhoun sold it to him, Mayo. The defendant, Mayo, also relied on the statute of frauds and alleges that the contract was in parol and not binding on Calhoun. Calhoun answers, denying that he ever made any sale of the land to the appellee, Hager, and in the conclusion of his answer states, "that he relies on and pleads all statutes of limitation as against frauds and perjuries and all other legal defenses." Mayo and Calhoun died during the pendency of the suit, and the same was revived against their heirs. The evidence in the case shows that the appellee, Hager, paid to Calhoun all of the purchase money for this land, and that the contract between Calhoun and the appellee was in parol. At the time this contract was made between these parties the appellee purchased of Calhoun his interest in the land also, and took possession of the whole tract.

It may be presumed that Calhoun had some interest in this land at the time of the contract, but the manner in which he ac-

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quires it or the extent of the interest is not disclosed. As to his interest, however, there is no controversy.

At the time of this alleged sale he had no right whatsoever to dispose of the interest of the infant children of James Hawden. The title was certainly not in him, and the substance and effect of the contract was, that Calhoun, who was acting as the guardian of the children, should procure for the appellee the title to this land whenever it would be obtained. Hager had bought the interest of Calhoun, was then in actual possession of the whole tract, and by making this contract with Calhoun, and advancing him the money for the land, to which Calhoun had no more title than Hager. Calhoun, in effect, agreed to obtain the title for him, and did in fact procure the heirs to make to appellee, deeds for their respective interest. The amended petition alleges that Calhoun agreed and promised to have these shares conveyed to the appellee, Hager. All the allegations in appellee's original and amended petitions on the subject of the contract and the procurement of the title, are specifically made, and no response whatever is made by Calhoun in his answer, except the general statement that it is untrue that the plaintiff never purchased the interest in the land which the defendant sold to Mayo. This is no response whatever to the petition. The petition alleges specifically the terms of the contract, and the payments, and that the purchaser was the interest of Mrs. Haunt, and that Calhoun was to procure the title, none of which allegations are denied by the answer. The conveyance of Haunt and wife was made to Calhoun before the revised statutes took effect and although Hager had advanced to Calhoun the money for the land long before Calhoun obtained the deed, still it was to enable Calhoun to make the purchase and procure the title for Hager, and when made the purchase resulted to the use and benefit of Hager under the agreement, as alleged in the amended petition by which he was to procure for the appellee the title to this land.

These allegations are undenied by either Mayo or Calhoun and the proof shows that Mayo made the purchase from Calhoun during the pendency of this suit, and as Mayo himself admits, with notice directly from Hager of his previous purchase and possession. In the case of *Fraleigh v. Langford*, 1 Mar. 362. This court decided that, a subsequent purchaser of land with notice

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of a prior sale is a trustee and holds subject to the prior equity. Also in *Cox v. Osborn*, 1 Mar. 229. In *Dumaresly v. Fishly*, 3 A. K. M. 368, it is adjudged that the statute of frauds does not apply to resulting trusts and that these trusts will be enforced though evidenced by parol alone. It results therefore, that as the money was paid to Calhoun by Hager to enable him to procure the title to this land for him, and that Calhoun did procure the title and that Mayo having notice of Hager's equity before his purchase, the purchase of Calhoun was for Hager and he is entitled to the deed.

There is nothing in the record showing that at the date of the bond executed by W. L. Hayden, in 1847, he was under age, but on the contrary the presumption is that he had arrived at age. In 1845 he had paid to W. L. Hayden a part of the purchase money for this land, and held the obligation of Hayden of that date, to make him a deed when he arrived at age. This bond is signed by his grandson, but on the 31st of May, 1847, two years after, he obtained the bond of Wm. Hayden under his own signature for a conveyance for this land. The petition and amended petition allege that he bought all these interests and paid for them and of which there is no denial.

We perceive no error in the judgment rendered by the court below and the same is now *affirmed*.

Judge Peters not sitting.

Apperson & Reid, for appellant.

Rodman, for appellee.

S. GARRETT, ETC., v. G. PHILLIPS.

Forcible Entry and Detainer—Possession—Premises not Vacated by Removal of Tenant.

The removal of a tenant does not vacate the premises as the possession, by operation of law, devolves on the landlord.

Forcible Entry and Detainer—Traverse Bond—Must be Executed to Traversee.

The statute requires that the traverse bond must be given to the adversary of the party traversing within three days after the finding of the jury.

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APPEAL FROM POWELL CIRCUIT COURT.

October 11, 1871.

OPINION BY JUDGE PETERS:

This was a proceeding by forcible entry, and detainer, in which the jury in the country found the defendant guilty of the forcible entry and detainer complained of, that inquisition was traversed by the appellee, and on the trial in the circuit court, after the evidence of the plaintiff was closed, a verdict was found by the jury that the inquisition was not true upon a peremptory instruction of the court so to find, and from the judgment of that court in conformity to the verdict this appeal is prosecuted.

It appears from the evidence that as early as 1848 or 1849 John Garrett, the grantor in the deed of date January 6, 1866, to Lucy and Sandford Garrett, took possession of the land in controversy and continued in possession to his death, which occurred after the period last named. When he died Sandford Garrett was living with him and Joseph Garrett moved in to keep house for Sandford, who was an unmarried man. Joseph remained there until some time in the fall of 1866, when he removed to Missouri, and Sandford then claiming under the deed from John Garrett, rented the premises to the witness, West, who entered and held under him till the 8th of April, 1867, when after he had removed all his household goods from the house, and before he could lock the door, appellee moved in.

The premises were not vacant upon the removal of West, the possession by operation of law devolved on his landlord from whom he got possession, and his term having expired, and he having removed, Phillips' entry was an intrusion upon the possession, with the intention to divest appellant of the previous possession, and for such intrusion the proceeding by warrant for forcible entry and detainer was an appropriate remedy.

But it is insisted in this court that the judgment is right because the proceeding is in the name of Lucy Garrett, when it should have been in the name of Sanford Garrett, who was in the actual possession of the land. The complaint in the warrant is that appellee, on the 8th day of April, 1867, did forcibly enter upon, and detain from the possession of the said "Lucy

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Garrett, and her trustee," one dwelling house, etc., which were in the peaceable possession of said Lucy Garrett and her said trustee. So that on the face of the warrant Sanford Garrett must be regarded as a plaintiff. Besides, in the traverse bond executed by appellee, he executed said bond to Sanford Garrett, trustee, as plaintiff in said warrant, so that if he was not plaintiff in the warrant, no traverse bond has been executed to the plaintiff and appellee had no case in court, and the traverse should have been dismissed for want of such bond. The statute requires that the traverse bond shall be given to the adversary of the party traversing the inquest within three days after the finding of the jury, to say nothing of estoppels. Sec. 511, Civ. Code.

The judgment must therefore be *reversed*, and the cause remanded with directions to award a new trial and for further proceedings consistent herewith.

Turner, for appellant.

Apperson, for appellee.

S. GARRETT v. G. PHILLIPPS.

Forcible Entry and Detainer—Warrant—Sufficiency of—Proper Party.

The objection to the warrant is that the proper party is not suing as plaintiff, that the warrant was in the name of Lucy Garrett, when Sanford Garrett should have been the plaintiff.

The traversee bond was executed to Sanford Garrett, trustee of Lucy Garrett as plaintiff, and if he was not the plaintiff appellee had no case in court, as the bond must be given to the traversee. The appellant selected his adversary and to him he gave the bond and he is thereby estopped to deny that the finding was for appellant, in the country.

Estoppel—Sureties on Sheriffs Bonds, Forthcoming Bonds and Obligors in Notes.

In a suit on a sheriff's bond the defendants are estopped by their own acknowledgment in the bond, from denying that the person described therein was sheriff at the date of the bond. In a suit upon a forthcoming bond for goods attached, the obligors are estopped from denying admissions in the bond, as controverting their existence.

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RESPONSE TO PETITION FOR RE-HEARING.

November 1, 1871.

OPINION BY JUDGE PETERS:

We are asked in a most elaborate petition for a rehearing by counsel for appellee to review the opinion delivered in this case, for various errors found therein as the learned counsel believes, and to take the opinion back. The *first* and main ground relied upon for a rehearing is, that the warrant is insufficient, and the court below should have quashed it, and as the verdict and judgment are right this court should not disturb them. The objection to the warrant seems to be that the proper person is not suing as plaintiff, that the warrant is sued out in the name of Lucy Garrett, when Sandford Garrett should have been the plaintiff. That objection was argued by the learned counsel in his brief on the hearing, and in replying to that argument, this court said in the opinion delivered, that the traverse bond was executed to Sanford Garrett, trustee of Lucy Garrett as plaintiff, and if he was not plaintiff, appellee had no case in court. In reply to that it is said in the petition that it was not the duty of appellee to prepare bond, and if it was insufficient it was the duty of the court below to have had a sufficient one prepared and executed, upon the fact being made known. If that position be conceded, the question is how does it benefit appellee? He did not inform the court of the insufficiency of the bond, and move to have it corrected. It certainly was not the duty of the court *sua sponte* to do so. But the bond was not defective within the meaning of section 753 of Civil Code. By section 511, a party in a proceeding of this kind who conceives himself aggrieved by the finding of the jury, may file a traverse with the justice within three days after the finding aforesaid, in the manner therein prescribed, and within the same time give bond with sufficient surety to be approved by the justice to his adversary, etc. He selected his adversary, and to him he gives his bond. The traverser necessarily must be the person to whom the bond is executed, and if it be to the wrong person it is the duty of the traverser before the trial in the circuit court to move to have the bond corrected and if he failed to do so, it is too late to say

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in this court that he had a right to amend that bond, or to execute a new one. If he had such right, a question we do not now decide, he certainly waived it, and the case must be tried here as it is presented by the record.

As then the traverse bond was executed to Sandford Garrett as traversee, he must be regarded as such by this court, and this appeal was properly prosecuted by him.

But is not appellee estopped by his bond to deny that the finding was for appellant in the country?

In a suit on a sheriff's bond the defendants are estopped by their own acknowledgment in the bond, from denying that the person described therein was sheriff at the date of the bond. In a suit upon a forthcoming bond for goods attached, the obligors are estopped from denying admissions made in the bond, or controverting their existence. Herman's Law of Estoppels, Secs. 249, 250. It has been repeatedly held by this court that a person who executes a note to a body, recognized in the writing as a corporation, is estopped to deny that such a corporation exists. All upon the principle that no one shall be allowed to deny what he has in so solemn a manner as by a writing admitted to be true. It seems therefore upon unquestioned authority appellee must stand by his admission in his bond in this case and the opinion must be adhered to.

Petition overruled.

Turner, for appellant.

Apperson, for appellee.

WM. GUNNELL'S CURATOR *v.* J. F. LUKE.

Attorney and Client—Lien for Fee—Compromise.

An attorney has a lien on choses in action or other claims or demands put in his hands for collection which cannot be defeated by a compromise between the parties, and a purchaser takes the property subject to the attorney's lien for a reasonable fee.

Cost—Officer's Fees—Lien.

The officers of a court are not entitled to a lien of the subject matter in litigation for their fees. Their fees are against the parties and are merely personal in their nature.

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APPEAL FROM SCOTT CIRCUIT COURT.

September 29, 1871.

OPINION BY JUDGE LINDSAY:

The Act of January 26, 1866, Myers' Supplement 685, giving to attorneys at law, liens upon choses in action or other claims or demands put in their hands for collection is intended to secure the payment of any fee which may reasonably have been agreed upon, or in the absence of such an agreement, a fair and reasonable fee for the services rendered. The attorneys Stevenson and Beck held a lien upon the entire amount the original plaintiffs in this action were entitled to recover from Gunnell, and this lien said plaintiffs could not defeat by compromise with Gunnell. He purchased their claim, and took it subject to the lien of said attorneys. Luke being jointly bound for said fee and having been compelled to pay it off, was thereby equitably substituted to the attorney's rights and entitled to recover from the assignee of his co-plaintiffs an amount equal to this pro rata of such fee.

The officers of the court did not, however, hold liens on the claim in litigation. Their fees were against the parties themselves, and were merely personal in their nature.

If Luke himself has any claim for compensation it is against his co-plaintiffs and not the claim in litigation. The assignee, Gunnell, can not be charged with the payment of any part of this costs, of the litigation incurred by his assignors nor of any part of Luke's claim for compensation for services.

As their claims are included in the judgment, it must be reversed. The cause is remanded for further proceedings consistent with this opinion.

Polk & Beck, for appellant.

Stevenson, for appellee.

AUSTIN C. GODSEY v. ROBERT H. GODSEY.

Bills and Notes—Execution of Note—Presumption as to Previous Indebtedness.

Upon the execution of a note the law presumes all previous outstanding indebtedness was settled by that transaction.

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Trial—Instruction—Want of Evidence.

An instruction should never be given where there is no evidence upon which to base it.

APPEAL FROM PERRY CIRCUIT COURT.

November 3, 1871.

OPINION BY JUDGE PETERS:

This action was brought to enforce the collection of a note alleged to have been executed by appellee to appellant for \$557 and \$62.00 on an account for a set of cards. Several grounds of defense are pleaded in the answer.

1st. That appellant procured the note to be executed when appellee was so drunk as to be incapable to transact business, or of knowing what he was doing.

2d. That at the date of the note appellant was indebted to him in the sum of \$475. For three years and two months labor performed for appellant for \$70 in gold, he got of appellee, and \$50 for 100 pounds of manufactured tobacco, which he pleads as a set-off against the note sued on; and as the \$62 for the cards, they were gotten in 1859, "or 1860 before the execution of the note sued on and the price constitutes a part of the amount of said note."

By an amended answer appellee pleaded non est factum, and having gone to trial on these issues, a verdict was found for appellee, and a judgment having been rendered accordingly, appellant has appealed to this court.

It perhaps would not be proper for this court to express any opinion as for whom the evidence preponderated, since we would not as it is presented in this record feel authorized to set the verdict aside upon the ground alone that it was not sustained by the evidence. But there is an error in giving instructions to the jury which must be fatal to the judgment.

By instruction No. 4, given on motion of appellant, the jury are told that if they believed the note was executed by the defendant, the law presumes that all previous indebtedness was then settled. That instruction is substantially the law.

By instruction No. 5, given at the request of appellee, the jury are told that they are to consider all the facts and circum-

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stances proved in the cause, and if they believe from the evidence that the execution of the note has been proven, still, if they believed from the evidence that plaintiff owed defendant for one labor charged, and the gold and tobacco, they should give the defendant credit for the same.

There are two objections to this instruction. 1st. It is in conflict with No. 4, given at the instance of appellant, and should have been qualified by stating further that by giving the note if they believe from the evidence, defendant executed it, the law presumes all previous outstanding indebtedness was settled by the execution of the note, and, 2d, there was no evidence in the case upon which to base said instruction. Jesse Combs proves that some twenty years before he testified, and before appellee was married, and he then had children grown, he had lived with appellant, but he does not prove anything about any contract to pay for his services, nor what they were worth. And there is no evidence whatever that appellant got any gold or tobacco from appellee. Jesse Combs is the only witness who proved that appellee ever done any business for appellant, and he proves that was more than twenty years before the time he testified, and that appellee had, since he was married, traded with and bought his goods from appellant. Instruction No. 5 was therefore improperly given as there was no evidence upon which to base it.

There is another matter which should be noticed which relates to the price of the cards. Appellant in his answer says they were gotten before the execution of the note, and the price constituted a part of the consideration of the note. This is rather a strange allegation if he did not execute the note.

Wherefore, for the errors indicated, the judgment must be reversed and the cause remanded with directions for a new trial and for further proceedings consistent with this opinion.

Rodman, for appellant.

ADAM DESHONG v. HUGH CAIN.

Injunction—Action to Enjoin Judgment—Sufficiency of Petition.

It does not appear from the petition that the judgment was rendered by mistake, but was the judicial determination of the court;

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and whether it was right or wrong could only appear from the proceedings as reproduced in the subsequent suit; and unless that preliminary object was effected, with at least reasonable certainty neither the circuit court nor the court of appeals should disturb the judgment.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 5, 1871.

OPINION BY JUDGE HARDIN:

This case is now, for the second time, in this court on the appeal of Deshong. The first judgment rendered, and which was reversed (1 Duvall 309), dismissed the petition on demurrer. The substance of the petition is set out in the former opinion of this court, and was sufficient as therein decided if sustained by proof, to authorize an injunction of the judgment of \$300.00 in favor of the appellee and to reverse and set aside said judgment.

The answer filed on the return of the cause controverted the material averments of the petition on which relief was sought, and on hearing the court again dismissed the action.

It sufficiently appears from the testimony of Commissioner Herd and others that his first report was in favor of Deshong for about the sum of \$300.00 on a settlement of the partnership, and although this report was set aside, a second report was made substantially reproducing it. But the court afterwards, on final trial, contrary to the commissioners' views, rendered a judgment for Cain from which Deshong prayed an appeal, but was prevented from prosecuting it by the losing of the papers.

It does not appear that said judgment was rendered for Cain by mistake but was the judicial determination of the court, and whether it was right or wrong could only appear from the proceedings as reproduced in the subsequent suit; and unless that preliminary object was effected with at least reasonable certainty, it seems to us neither the circuit court nor this court should disturb the judgment. It is manifest from the evidence and report of the last commissioner that the attempt to so reestablish even the substance of the pleadings, papers and evidence on which the court acted as to enable a revising court to know the grounds of said judgment, has utterly failed.

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We are of the opinion, therefore, that the action was properly dismissed.

Wherefore, the judgment is affirmed.

Judge Peters did not preside in this case.

Hazelrigg, Winn, for appellant.

Turner, for appellee.

M. DONAHOO v. R. T. GRIGSBY.

Contracts—Temporary Mental Disability—Drunkenness.

The appellee had taken one or two drams that morning, and although the lawyer who wrote the contract of sale, and others who saw him that morning did not discover that he was under the influence of liquor or incapacitated to make such a trade, still there was no doubt but what he was still laboring under the effects of his debauch and was in such a condition of mind as to be entirely reckless, not only in regard to his estate, but to every sense of moral duty. The bargain was unconscionable.

APPEAL FROM NELSON CIRCUIT COURT.

October 25, 1871.

OPINION BY JUDGE PRYOR:

The appellee, a young man, reckless and intemperate in his habits and frequently indulging in the use of intoxicating liquors to such an extent as to render him for days and weeks incapacitated to transact business, sold to the appellant his estate then in the hands of his father, as statutory guardian, of the value of about \$2,200.00, and some personal property of value, for the sum of nine hundred dollars, eight hundred dollars of which was paid in money and the balance in a watch. For some days previous to this sale and up to the evening preceding it, the appellee had been indulging in one of his drunken frolics and during this time was making constant endeavors to dispose of his property, declared his intention of selling it, if for only one hundred dollars.

W. Johnson, a witness, who was the executor of the will of the appellee's uncle, under which he had derived the property and being familiar with its character and value, says, that on the

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evening before the sale was made the appellee came to his office beastly drunk and incompetent to transact any business, and proffered to sell his estate to him; that he was then offering to take a great deal less than it was worth, and the witness, in order to dissuade him from sacrificing his property, proposed to him to give him the next morning, if it was not then sold, the sum of \$2,000.00 for it, and although the witness says he made the offer more to prevent him from selling than anything else, still he would have given him the \$2,000.00. The appellee declined to sell unless he could then dispose of it. On the next morning after the conversation with Johnson, the appellee and the appellant are found at the residence of appellee's father who lived a short distance from Bardstown, and the mother is informed by the appellee that he has sold to appellant his property for \$2,000.00. The appellant was then informed by the mother and father that he was in no condition to trade, and the mother made inquiry of the appellant to know if he was to give the appellee \$2,000.00, and suggested that she was to get \$1,000.00 of the money. To this suggestion of the mother appellant made no response and returned to town with the appellee and had the contract of sale written. The appellee had taken one or two drams that morning, and although the lawyer who wrote the contract and others who saw him that morning did not discover that he was under the influence of liquor or incapacitated to make such a trade, still there is no doubt but what he was still laboring under the effects of his debauch and was in such a condition of mind as to be entirely reckless, not only in regard to his estate but to every sense of moral duty. The bargain was and is unconscionable. It was the duty of the appellant to have disclosed to the mother who was urging him not to trade with her son on account of his condition the real nature of the contract between them. The son, in his demented condition resulting from his recent dissipation, imposing upon the mother by false statements and the recipient of the speculation by his silence acquiescing in the statements.

The judgment of the court below is affirmed on the original and reversed on the cross-appeal with directions to the court below to refer the case to a commissioner for the purpose of ascertaining the personal property, if any, and its value sold by

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the appellant under this contract, and when ascertained, the value to be credited on the sum required by the judgment to be refunded the appellant by the appellee.

McKay, for appellant.

Johnson, Grigsby, for appellee.

ELIZABETH DIAL v. JOSEPH DIAL.

Divorce—How Judgment for may be Vacated.

There is no mode of annulling a judgment for divorce except as prescribed by the Code of Practice, in which either party may file a petition for that purpose and the case is heard as other equitable actions. Such a judgment may be annulled or revoked by the court granting it at any time as prescribed by the statutes, but this can only be done by the petition of the parties as prescribed by the Code.

Divorce—What is a Final Judgment.

A judgment a mensa et thoro and an allowance to the wife is such a final judgment as may be appealed from.

APPEAL FROM UNION CIRCUIT COURT.

November 4, 1871.

OPINION BY JUDGE PRYOR:

The allegations of the petition are sufficient if sustained by the proof to have authorized a judgment for a divorce a vinculo matrimoni by the court below. A residence in the county of Union, where this suit was brought, is alleged for nearly twenty-six years, and also an allegation of cruel and inhumane treatment by the husband, and even if the allegations are insufficient to have authorized such a judgment, they certainly are sufficient to authorize a judgment for a divorce from bed and board. This judgment a mensa et thoro and the allowance to the wife is such a final judgment as may be appealed from. There is no mode of annulling the judgment except as prescribed by the code of practice in section 464, page 129, in which either party may file a petition for that purpose, and the case is heard as other equitable actions. Such a judgment

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may also be annulled or revoked by the court granting it at any time as provided by the Revised Statutes, but this can only be done by the petition of the parties as provided by the Code.

Judgments affecting the rights of property in suits of this character and allowances made for the maintenance of the wife during the pendency of the action are subjects of an appeal.

The appellant and the appellee had been married and living together as man and wife for about twenty-six years.

Unpleasant family troubles seem to have originated between them without any apparent cause. Their neighbors speak of them both as being clever, industrious citizens, and, although the children who have testified in this case have given a history of the conduct of their father conducing to show that he has occasionally treated his wife horribly, still their devotion to and affection for their mother had induced them no doubt to exaggerate to some extent the history of the wrongs done her. There is no case made out from the proof entitling her to a divorce a vinculo matrimonii, but from their own statements it seems that they are not inclined to live with each other, and the proof indicates that they are equally in fault.

The estate of the husband is valued at about \$3,500. The wife is a frail, delicate woman, and unable to labor for her support. The allowance made her by the court below is not deemed sufficient. She should have been allowed not less than the sum of \$125 per annum from the time prescribed in the judgment of the court below. The judgment, so far as the allowance to the wife is made, is reversed, with directions to allow the wife not less than the sum of \$125 per annum, and to secure this a lien by the judgment should be retained on the land described in the petition.

Bush, for appellant.

James, for appellee.

B. F. DOTY *v.* JOHN BENCE'S HEIRS.

Judgment—Possession of Land Under Judgment Reversed—Rule for Restitution.

The proceedings by rule or motion for restitution of money or property obtained under the direct operation of a judgment which has

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been reversed is well known to courts of law and is equally allowable in courts of equity. The chancellor has the power to remedy the injustice which may have been done under his own orders when vacated by an appellate tribunal. The order for restitution cannot be resisted on the grounds of any equity thus disposed of by the dismissal of the bill.

APPEAL FROM LEWIS CIRCUIT COURT.

November 3, 1871.

OPINION BY JUDGE PRYOR:

This court, in an opinion heretofore rendered in this case, directed the court below to dismiss the cross-petition of the appellees, and in that opinion adjudged that if the appellees were entitled to the land in controversy, *their appropriate remedy was by a separate action.*

The court below had, however, adjudged that the land in dispute belonged to the appellees and awarded them a writ of possession, and under that judgment the appellant had surrendered the land to the appellees. The court below, in accordance with the opinion by this court, dismissed the cross-petition of the appellees, but this dismissal left them in possession of the land surrendered to them by the appellant under the judgment that had been reversed.

The appellants upon the return of the case to the court below in order to regain the possession obtained a rule against the appellees for a restitution of the possession of the land. The appellees responded to the rule, and alleged as a reason for refusing to restore the possession the same facts as set forth in their cross-petition that had already been dismissed by the court below in obedience to the mandate of this court. The court below should have disregarded the response to the petition and returned to the appellant the possession. The remedy for the appellees, if they owned the land, had been pointed out by this court, and it was expressly decided in the opinion rendered that they could not prosecute their claim against the appellant in this proceeding.

They had obtained the possession under a judgment that has been reversed, and it was proper and right that by a rule of the court this possession should be returned by them.

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This view of the question presented is sustained by reported adjudications of this court in the case of *Morgan v. Hart*, 9 B. Monroe, page 80, where the following language is used by the court: "The proceeding by rule or motion for restitution of money or property obtained under the direct operation of a judgment which has been reversed is well known in courts of law, and we have no doubt it is equally allowable in a court of equity. The chancellor has the power to remedy the injustice which may have been done under his own orders when vacated by an appellate tribunal."

We are satisfied that when the decree of reversal extends, as it did in this case, to a new trial of the bill for want of equity in the demand set up or for want of jurisdiction in the court.

The order for restitution can not be resisted on the ground of any equity thus disposed of by the dismissal of the bill, and if there be any equitable reason for not coercing the order or decree for restitution it should be made available as a ground for enforcing, and not for preventing or modifying the order of restitution.

This opinion is sanctioned and approved in the case of *Watson v. Avery*, 3 Bush 643. In the case of *Castleman v. Comb*, 7 Monroe, page 277, that where a decree is rendered in the court below in the cross-action by which a party is placed in possession and reversed here the party ousted by the judgment should have restitution.

The appellees are now insisting after they have thus obtained the possession of the land, that appellant should be compelled to resort to his action of ejectment in order to regain the possession. It may be that appellants own the land, but if permitted to assert their right under a response to the rule for restitution, there was no necessity for any such action in the court as to the dismissal of the cross-petition.

It was the duty of the appellee to have surrendered the possession and then if they desired to bring their action as suggested by this court in the former opinion rendered.

The judgment of the court below discharging the rule is reversed and the cause remanded with directions to the court below to award restitution.

Doty, McKee, Cord, for appellant.

Phister, for appellees.

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ELIZABETH DONAHUE, ETC., v. W. A. THOMAS, ETC.

Bail—Forfeiture—Surety—Indemnity—Reward—Expense of Recapture—Lawyer's Fees.

Where a surety is indemnified against loss by reason of the forfeiture of a bail bond, he is entitled to recover against the indemnitor all the expenses incurred in the recapture of the defendant, including the amount of the reward paid to the parties apprehending and arresting the criminal.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 13, 1871.

OPINION BY JUDGE PETERS:

This suit was brought to foreclose a mortgage executed by appellants to Algin Thomas, James S. Thomas, Taylor Fitzpatrick and Wm. F. Hanks to secure them as the sureties of George W. Donahue in their bail bonds for his appearance in court to answer to three indictments for felonies, the penalty being \$875 in each bail bond. From the copies filed it appears Algin Thomas was the surety on the first, Wm. T. Fitzpatrick and James Thomas were the sureties on the second, and appellants and Wm. F. Hanks were the sureties on the third. The undertaking by the appellants was that if the mortgages should to any extent or in any way be made liable as bail on the bonds of the said Donahue and should incur any liability or loss by reason of being such bail, they would pay the same.

George W. Donahue failed to appear and answer the charges and the bonds were forfeited, but before judgments were rendered appellees, with John Fitzpatrick and Thomas Greenwade, the last two being his sureties on a fourth bail bond, by printed advertisements containing a description of G. W. Donahue, offered a reward of five hundred dollars for his capture and delivery to the jailor of Montgomery county. Shortly after this was done he was captured in Lee county, Virginia, and brought and delivered to the jailor of Montgomery county, and the three men who captured and brought him back claimed and received the reward paid by A. Thomas.

One of appellees claimed a considerable sum for money expended in expense and for time lost in going to the state of

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Missouri in endeavoring to take Donahue, and they claim lawyers' fees and other expenses in resisting the motion for judgments against them on said forfeited recognizances. For these sums and the five hundred dollars which they allege they paid the captors of Donahue, they sought judgment. The cases on the forfeited recognizances against said mortgages were dismissed.

The Court below rendered judgment for the sum of \$500 with interest from the 21st of December, 1868, till paid, also for \$83.50 and for \$19.10 with interest from date of judgment till paid, and costs, and for a sale of so much of appellant's land as would be sufficient to pay said sums. Of this judgment appellants complain.

John Fitzpatrick and Thomas Greenwade being the sureties of said Donahue on another bail bond were interested alike with appellees in his capture, united in the offer of the reward of five hundred dollars and were bound for their respective portions. John Fitzpatrick proves that A. Thomas sued him for his part, viz.: \$100, and that he had actually paid it. Thomas Greenwade proves he united in offering the reward; that he had assumed to pay to appellant, A. Thomas, \$100, and although he had not paid it, still he was bound for and able to pay the same, and had real and personal estate more than sufficient to pay subject to execution.

He joined in the offer of the reward; was interested in the capture of George Donahue; was jointly bound with the other parties for the reward and the payment of the whole by appellee; was a payment for Thomas Greenwade, his joint obligor, to the extent of his part of the reward, and before he can make appellants responsible for T. Greenwade's part he must show that he has prosecuted his claim against him to legal insolvency.

With this evidence in the case it was erroneous to adjudge to appellees more than three hundred dollars with interest thereon for the reward paid for the capture of Donahue until after appellee had failed by suit to coerce the \$100 out of T. Greenwade. Nor did the evidence authorize any judgment for money asserted to have been expended in the trip to Missouri, which seems to have been included therein.

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If appellants were not willing for the special judge to try the case they should have objected at the time, but having failed to do so, they waived any objections and it is too late to complain for the first time in this court.

But for the errors indicated the judgment is reversed and the cause is remanded with directions to render judgment against appellants for \$300 with interest from the 21st of December, 1868, till paid, also \$19.10 costs, and for twenty dollars attorneys' fees for resisting the motions for payments on the forfeited recognizances credited by the \$30 paid by appellants, and for the payment of the amounts specified, the mortgaged estate should be sold if not otherwise paid. Appellees will be entitled to their costs in the court below.

Holt, for appellants.

Turner & Cornelison, for appellee.

W. W. GRAVES, EXECUTOR, v. ENOCH CLARK'S ADMINISTRATOR.

Trial—Instructions must not give Prominence to any Part of Testimony.

The words, "actual payment," were calculated to mislead the jury and withdraw from their consideration all the testimony bearing on the issue, except that direct and positive in its character.

Trial—Instructions—Selecting Facts Proven.

An instruction which selects from all the facts proven those most favorable to the party offering it should be refused.

Trial—Jury—Disagreement as to Testimony—Request for Simplification of Instructions—Explanation must be in Writing.

The jury returned into court and asked that the instructions be simplified and the court gave oral instructions in explanation of the written instructions already given.

Held, that this is error, as the provision of the Code requiring instructions to be in writing, where either party requests it, is imperative.

APPEAL FROM FAYETTE CIRCUIT COURT.

September 27, 1871.

Opinion of the Court.

OPINION BY JUDGE PRYOR:

We perceive no error in the refusal of the court to give instruction No. 1 asked for by appellant.

The words, "actual payment," were calculated to mislead the jury, and withdraw from their consideration all the testimony bearing upon the issue, except that direct and positive in its character. The same objection applies to this instruction as modified by counsel. The same degree of proof and no other was required to support the issue made in the case, as would be required in any other civil action.

The jury must have believed from the evidence that the note was paid off before finding for the defendant, and the weight of evidence should control in this as in any other issue of fact tried by a jury in an ordinary proceeding.

The instruction given at the instance of the appellee should have been refused. This instruction selects from all the facts proven those most favorable to appellee, and these facts are made more prominent than any other by having the attention of the jury called specially to this by the instruction. They must decide the case from all the evidence adduced, and the facts embodied in the instruction are to be considered by the jury in connection with all the other facts proven.

By section 361, Civil Code, it is made the duty of the court, when the jury disagree as to the testimony or any part of it, or desire to be informed upon any legal question arising in the case to give them the information desired in the presence of or after notice to the parties or their counsel. In this case, the jury after retiring to their room returned into court and asked that the instructions be simplified. The court then gave verbal instructions in explanation of the written instructions already given, to which appellants objected at the time, and required that the instructions should be reduced to writing. This the court refused to do, and this refusal on the part of the court is also complained of as error. Section 348, Code of Practice, reads: "When the evidence is concluded, either party may request instructions on points of law, which shall be given or refused by the court, which instructions shall be reduced to writing if either party require it."

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This provision of the Code is imperative as was decided by this court in the case of *Ferguson v. Fox, Admr.*, 1 *Metcalf* 85. For this error, if no other, the cause is reversed with directions to set aside the verdict and judgment in the court below and give appellant a new trial and for further proceedings not inconsistent with this opinion.

Breckenridge & Buckner, for appellant.

Kinhead & Buckner, for appellee.

WILLIAM JOUETT, ETC., v. POPLAR MOUNTAIN COMPANY.

S. J. HUNTER v. POPLAR MOUNTAIN COMPANY.

Eminent Domain—Construction of Railroad—Right-of-way—Entry with Knowledge of Landowner—Trespass.

The action of trespass cannot be maintained against a railroad for its right-of-way where the entry on the land was made while the owners were living on it and no objections being made thereto.

APPEAL FROM CLINTON CIRCUIT COURT.

OPINION BY JUDGE PRYOR:

Affirmed on appeal of Jouett, etc., and reversed as to S. G. and S. J. Hunter on the cross-appeal of appellee.

These three cases were tried together in the court below and a verdict rendered for the plaintiffs in each case. The plaintiffs in the court below are the appellants in this court. These were actions of trespass instituted by the appellants against the appellee for constructing without right and against the consent of the appellant a railroad in and over their respective lands. The instructions asked for by either party will not be considered by this court unless it appears that objections were made to the giving of the instructions in the court below, an exception taken upon the refusal to instruct not being deemed sufficient. It is difficult to perceive how the action of trespass could be maintained by either party upon the facts proven.

The entry upon the land was made with the knowledge and consent of the parties in possession at the time the road was constructed by the company, and as is shown in the two actions

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of S. G. Hunter and S. J. Hunter, the railroad company entered upon the lands by the consent and under a written agreement with S. G. Hunter while he was in possession and held the legal title.

The appellants were living upon the land at the time, and made no objection whatever to the construction of the road, but on the contrary the proof shows that they were assenting to it.

The appellees pray a cross-appeal in the two cases of S. G. and S. J. Hunter only. The case as to the appellant, William Jouett, is affirmed and the case as to S. J. and S. G. Hunter reversed upon the cross-appeal, and for further proceedings thereon as to them not inconsistent with this opinion.

Joseph E. Hays, for appellants.

Winfrey & Winfrey, for appellee.

STROTHER, DEAN, ETC., v. THOMAS ALLIN'S ADMR.

Judgment—Plea in Bar.

It having been judicially settled that Allin did not appropriate the money of the Deans to his own use, and it being established that he did pay the same to Taylor and take his note therefor, which note is the subject of the controversy in this action, it must follow that said note, although made payable to Allin, was in point of law and fact the property of the Deans and that Allin merely held same in trust for them.

Held, that in such a controversy a judgment rendered in an action for a breach of contract, which this suit develops, was never violated, cannot be made to operate as a plea in bar.

APPEAL FROM MERCER CIRCUIT COURT.

June 16, 1871.

OPINION BY JUDGE LINDSAY:

The testimony in this case leaves no room to doubt that the four hundred dollars for which Taylor executed his note to Allin in May, 1854, was the money received by the latter from the Deans as a payment on the poorhouse lands bought by them from Taylor as agent for the Mercer county court.

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It is doubtless true that Taylor received the money upon Allin's check to the Commercial Bank, but it is equally clear, the real basis or consideration for the note passed from the Deans and not from Allin, and that the check was received by Taylor in lieu of the specific or identical money paid by the Deans. The latter, by their cross-petition, charged in effect that Allin had converted said four hundred dollars to his own use instead of paying it over to Taylor as he had agreed to do, and asked judgment against him on account of such violation of his contract.

Allin's administrator by his answer denied these charges but either failed to make any suggestion as to what disposition his intestate had made of the Deans' money. Upon the trial of the issue judgment was rendered in favor of Allin's administrator, and he pleads that judgment as a bar to this proceeding.

It having been judicially settled that Allin did not appropriate the money of the Deans to his own use, and it being unmistakably established that he did pay the same to Taylor and take his note therefor, which note is the subject of the controversy in this action, it must follow that said note although made payable to Allin was in point of law and fact the property of the Deans, and that Allin merely held the same in trust for them.

The money due upon said note has been paid into court and the contest is now between the representative of the trustee and the cestui que trust as to whom it shall be paid.

In such a controversy a judgment rendered in an action for a breach of contract, which this suit develops was never violated, cannot be made to operate as a plea in bar.

If Allin's administrator in the first suit had discovered the fact that he held the note of Taylor for the money then in litigation, the pleadings could have been so amended as to have presented the identical issues raised in this action. But he concealed that fact, and thereby enabled himself to defeat the appellants, and he now relies upon that judgment as a bar to this action. Under such circumstances not only are the equities of this case against him, but the causes of action, although involving the same money, are entirely different.

We are of the opinion that the judgment relied upon is not a bar to the right of the Deans to recover in this action, and that

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under the pleadings and proof the money in court should have been adjudged to them.

Wherefore the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Thompson, for appellants.

Gaither, Durham & Jacobs, for appellee.

A. A. GRADY, ETC., v. RUFUS BAILEY, ETC.

Vendor and Purchaser—Title Bond—Assignment—Responsibility of Assignor.

The assignment of a title bond by the vendee therein does not impose on him the responsibility of the vendor, but only that of an ordinary assignor.

Judgment—Rescinding Contract of Assignment.

A judgment rescinding a contract of assignment of a title bond without litigation between the assignor and the maker is erroneous.

APPEAL FROM ADAIR CIRCUIT COURT.

September 7, 1871.

OPINION BY JUDGE HARDIN:

According to well settled principle the assignment by Grady, of the title bond of Williams, did not necessarily impose on Grady the responsibility of Williams, the vendor, but that of an ordinary assignor; and as the answer of Mrs. Turk, tendered in the suit of Bridgewater on the 7th of November, 1867, only disclosed a defect of title in Williams, without the further facts necessary to fix the liability of Grady on his assignment, it did not, in our opinion, present a valid defense to the action, and for this reason the court might have properly rejected it, independently of any statement of Mr. Russell, the counsel of Bridgewaters, or for himself; and this being so it logically results that the statements of Russell to the defendant's counsel in relation to the acceptance of the deed of Williams, however incorrect, did not constitute a sufficient ground for setting aside the judgment. It seems to us, therefore, that the judgment rescinding the contract of assignment, without litigation between the

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assignor of the bond and Williams, and without the disclosure of facts disposing with such proceeding, is erroneous.

Wherefore the judgment is reversed and the cause remanded for a judgment not inconsistent with this opinion.

Russell, Garnett, for appellants.

Baker & Walker, for appellees.

A. D. GROHEGAN v. DORSEY BULER'S ADMR.**Will—Construction—Life Estate or In Trust.**

The devise is, of the estate to her "her lifetime or as long as she remains unmarried, for the support of my children."

Held, that the devise was to the wife in trust for the testator's children.

APPEAL FROM LEWIS CIRCUIT COURT.

June 19, 1871.

OPINION BY JUDGE HARDIN:

The only material question to be decided on this appeal is, whether by the second clause of the will of Dorsey Buler, Sr., his widow, Eleanor Buler, was vested with a life estate in the testator's property for her own use and benefit in the event of her remaining unmarried, charged with the support of his children, or only took the estate in trust for them?

The devise is, of the estate to her, "her lifetime or as long as she remains unmarried, for the support of my children."

This court construes this provision as simply a devise of the estate to Mrs. Buler in trust for the testator's children, consequently we are of the opinion that the estate reported in this case as assets in the hands of W. W. Buler, as administrator of Eleanor Buler, but which we conclude is but the accumulation of the devised property, belonged to the devisees of Dorsey Buler, Sr., and Dorsey Buler, Jr., had a vested interest in it which his mortgage to Grohagen operated to assign to him as security for his debt; and the judgment is erroneous in so far as it fails to conform to this view and so determine the rights of the parties.

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This conclusion renders it immaterial whether the advancements charged were made by Dorsey Buler, Sr., or by Mrs. Buler out of the estate in her hands, as in either case it was right to charge them. For the error indicated the judgment is reversed and the cause remanded for a judgment in conformity with this opinion.

Cofer & Montgomery, for appellant.

Johnson, for appellee.

G. AND JOHN T. GUDGELL *v.* HARLAN MOSES.

Vendor and Purchaser—Parol Contracts—Delivery of Possession.

The contract between the parties was by parol and not binding on either. The delivery of the key to the dwelling house was only constructive possession which did not deprive the appellants of the actual possession.

APPEAL FROM BATH CIRCUIT COURT.

October 21, 1871.

OPINION BY JUDGE PRYOR:

The contract between the appellants and the appellee for the sale of the land was in parol and not binding upon either party.

In a few days after the parol contract was made the appellants hearing of the existence of some lien held by appellee on the land refused to accept the deed, and notified the appellee that the contract would not be consummated. The only possession that appellants ever had was a constructive possession by reason of the delivery to him of the key of the dwelling house. They never took actual possession of the premises and the key was offered to be returned in a few days after the parol sale was made. There was nothing to prevent the appellee from entering upon the land at any time; in fact, he had never been deprived of the right to enter or of the actual possession. In addition to all this the damage the land sustained was by reason of the travel by the neighborhood through this land by reason of the impassable condition of the roads during the winter, in which traveling the appellee participated in conjunction with his neighbors. The

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damage sustained, if any, was merely nominal, and caused by the failure of the appellee to keep up the fencing on his own land.

The judgment is affirmed on the original and reversed on the cross-appeal and cause remanded with directions to dismiss appellant's petition.

Gudgell, Apperson, for appellants.

Turner, Reid & Stone, for appellee.

JAMES M. GREENWADE v. COMMONWEALTH.

Rewards—Arrest by Sheriff—Want of Good Faith.

The appellant at the time was the sheriff of Meniffee county and had a bench warrant in his hands for the arrest of the accused, and before the court could certify his right to the reward as required by the statute in such cases, it was proper that the facts should present a case divested of everything like a want of good faith between the sheriff and the state.

APPEAL FROM MENIFEE CIRCUIT COURT.

November 7, 1871.

OPINION BY JUDGE PRYOR:

The proof in this case on the part of the appellant shows that the accused, John Gibbs, was induced to surrender himself under the advice and at the instance of his father. He had been evading the officers of the law for some time and his father being cognizant of his hiding place procured Frisby and Jones, who were friends of the accused, to visit him and say to him that he had better surrender. The accused at once came to his father's house and there, with pistol in hand and in the presence of all his friends, permitted the appellant without offering any resistance whatever to arrest him. This arrest was made after his surrender and at a time when it was convenient for the appellant to be near enough to lay his hands gently upon him, and we are inclined to think with a full knowledge that the surrender was to be made at that particular time. The father and mother and all the friends who escorted him home from this secret spot in the woods are very careful to say that he never surrendered until the appellant made his appearance and we are

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inclined to think from their mode of testifying that there must have been some understanding between them all in relation to this important arrest before it was made.

The appellant at the time was the sheriff of Menifee county, and had a bench warrant in his hands for the arrest of the accused, and before the court below could certify his right to the reward as required by the statute in such cases, it was proper that the facts should present a case divested of everything like a want of good faith between the sheriff and the state. We are not disposed to disturb the judgment of the court below and the same is now affirmed.

Stone, Cooper, for appellant.

Attorney-General, for appellee.

H. N. CREELY, ETC., v. W. H. KEMPER AND WIFE.

Fraudulent Conveyance—Conveyance to Wife Before Creation of Debt.

At the time of the execution of the deed and assignment of the bond to Mrs. Kemper, her husband was not indebted to the appellants, therefore her right to the property is superior to that of any of her husband's creditors.

APPEAL FROM FLEMING CIRCUIT COURT.

October 19, 1871.

OPINION BY JUDGE PRYOR:

At the time of the execution of the deed to Mrs. Kemper for the property in the town of Elizaville, and the assignment of the bond to her for the title for the Stewart house and lot, her husband was not indebted to the appellant.

The husband of Mrs. Kemper seems to have been a reckless, wild and improvident young man and upon his arrival of age his guardian, seeing doubtless that his wife and children would be reduced to want, advised him to pay off his debts and secure his property to them. His debts were all paid except two small debts that he had created during his minority, and under the advice of his guardian and friends, he did secure this property now sought to be subjected to these debts, to his wife and

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children. The deed to the tavern property was entered of record, and the fact of the transfer of the Stewart bond to the wife was not attempted to be concealed from any one.

We are satisfied that the right of the wife to this property should not be interfered with for the purpose of enabling the appellants to make their debts. Her right to the property so far as this record shows is superior to that of any of the husband's creditors. The judgment of the court below is affirmed.

Throop, for appellants.

Phister, Cord, for appellees.

FOLLIS & THATCHER v. PROCTOR & GAMBLE.

Judgment—Action on Foreign Judgments.

The appellant's failure to answer was an admission of the allegations, that such a judgment was rendered and cured the defect in the record filed with the petition.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 19, 1871.

OPINION BY JUDGE PRYOR:

The appellants were sued in the Campbell Circuit Court by the appellees on a judgment obtained by appellees against them before a justice of the peace in the state of Ohio. They allege in their petition the obtention of the judgment and the amount they are entitled to recover.

The appellants were duly served with process and a judgment by default rendered against them. Their failure to answer was an admission of the allegations: that such a judgment was rendered and cured the defect, if any, in the record filed with the petition.

The judgment is affirmed.

Hodge, for appellants.

Hawkin, for appellees.

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JOHN W. EVANS v. FRANK LITTELL AND OTHERS.**Damages—Injury to Property—Repelling Assault—Vindictive Damages.**

The jury should have found for the appellant, the value of the horse unless it was killed by appellees in repelling an assault made on them by him, which could not have been successfully resisted by the use of less force than was resorted to by them. If the appellant willingly engaged in the combat he is not entitled to vindictive damages.

APPEAL FROM GRANT CIRCUIT COURT.

September 7, 1871.

OPINION BY JUDGE LINDSAY:

We are of the opinion that the instructions in this case were as favorable to the appellant as he had the right to demand.

Under the same the jury were bound to find for him the value of his horse unless it was killed by the appellees in repelling an assault made upon them by him, which could not have been successfully repelled by the use of less force than was resorted to by them.

Appellant had no right to vindictive damages in any state of case. The evidence shows clearly that if he did not provoke, he willingly and eagerly engaged in the combat.

The verdict is not so flagrantly against the weight of the evidence as to authorize the interference of this court.

Judgment affirmed.

Scott, for appellant.

EZRA L. H. GARDINER, ETC., v. J. G. PRICE, ETC.**Sale—Cumbersome Property—Place of Delivery.**

As a general rule applicable to the sale of cumbersome property, the seller's ordinary place of sale, production or manufacture is the place of delivery.

APPEAL FROM JEFFERSON CIRCUIT COURT.

October 17, 1871.

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OPINION BY JUDGE HARDIN:

Independent of collateral circumstances conducing to show that a delivery of the coal tar at Louisville to the appellants or a common carrier for them, was the delivery intended by the contract, we are satisfied from the context of the written agreement of the parties that the Common Pleas Court properly so construed it.

There is no doubt that as a general rule applicable to the sale of cumbersome property, the seller's ordinary place of sale, production or manufacture is the place of delivery.

Of course there are exceptions to this rule, as where the parties stipulate differently, or accompanying or surrounding circumstances indicate some other as the place of delivery intended, as was the case in *Branson v. Gleson*, 7 Barbour 472, cited by both parties in this case.

But nothing appears in this case to make it an exception to the general rule we have stated. Therefore the judgment is affirmed.

Brown, Fox, for appellants.

James, Speed, for appellees.

CATHARINE DOAK, ETC., v. S. H. WAKEFIELD.

Nuisance—Obstruction of Public Highway—Individual cannot Recover—Special Injury.

A public nuisance is not the subject of a suit by a private individual unless he has sustained some special injury thereby. The obstruction of a public highway is a nuisance common to all who use it.

APPEAL FROM SHELBY CIRCUIT COURT.

December 17, 1870.

OPINION BY JUDGE PETERS:

This suit was brought in the court below by Catharine Doak, P. B. Doak and Richard Ross against S. H. Wakefield to enjoin him from closing and obstructing the use of a public highway, as they allege, dedicated to the public by the former owners of

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the land over which it passes and which has been used as such for more than thirty years, and for general relief; a temporary injunction was granted, but on final hearing the injunction was dissolved and their petition dismissed, from which judgment this appeal is prosecuted.

The appellants do not allege, nor have they shown that they have any other interest in this road than that which belongs to every other citizen in the community. It was said by this court in *Barr & Yeiser v. Stevens, etc.*, 1 Bibb. 292: Upon general principles that common interest which belongs equally to all, and in which the parties suing have no special or peculiar property, cannot maintain a suit. Thus a public nuisance is not the subject of a suit by a private individual, unless he has sustained some special injury thereby.

As if a man fell trees in a public highway whereby it is stopped up to the annoyance of passengers it is a public nuisance common to all, for which at the common law he might be prosecuted by the commonwealth and punished. But a suit against him could not be maintained by a private individual who had only sustained the injury common to all, who were turned out of the way.

But if in attempting to ride over the trees felled in the road an individual's horse should be thrown, whereby either himself or his horse is wounded, he may maintain an action for this special damage.

The reason why he cannot maintain the action without special damage is that if one can, all might, which would be ruinous.

In view of this authority, which has been recognized in subsequent cases by this court, this action cannot be maintained and the petition was properly dismissed.

If as contended for this is a public highway dedicated to the public use (a question about which we express no opinion), the remedy for its obstruction is by a different proceeding.

Judgment affirmed.

Bullock & Davis, Tyler, for appellants.

Z. Wheat, for appellee.

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SOLOMON P. FRANK v. HERMAN CARLTON.

Vendor and Purchaser—Sale of Land—Suit to Enforce Specific Performance—Necessary Allegation—Tender of Deed.

A vendor seeking a specific execution of a contract of sale must allege a readiness and an ability to execute on his part and tender a deed with the petition.

APPEAL FROM KENTON CIRCUIT COURT.

June 14, 1871.

OPINION BY JUDGE PETERS:

Solomon P. Frank died in Covington in 1849, intestate, leaving a widow, and the appellant, Solomon P. Frank, his only child of tender years. His administrator filed his bill in equity in the Kenton circuit court, alleging that his intestate left no personal estate and no real estate except a lot in the city of Covington, particularly described, which he had purchased of one Herman Carlton by executory contract at the price of two hundred and fifty dollars, no part of which had been paid, and that he held the bond of Carlton for the conveyance thereof and that he owed to one Higgins \$30 and prayed for a sale of the lot to pay said debt. The widow and infant child were served with process, but before there was any answer by a guardian ad litem and without a response to him, so far as appears, the master made a report and a sale of the lot was ordered and was made, but was set aside on the 17th of September, 1850, and on the 21st of the same month, J. F. Fish, Esq., was appointed guardian ad litem for the infant, and on the 31st of October thereafter, Carleton filed his answer to the original bill making it a cross-bill against the widow and heir at law of decedent. Summons were issued on this cross-bill and served on both the defendants thereto and C. B. Bartlett appointed guardian ad litem to defend for the infant. Bartlett failed to make any answer and the original bill was dismissed, and under the cross-bill of Carlton the lot was decreed to be sold and was actually sold, and P. S. Bush became the purchaser thereof in 1852. But whether a deed was ordered to be made to him and was made and properly acknowledged and certified does not appear, and from the judgment aforesaid, the heir has appealed.

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It seems that the notes executed for the price of the land to Carlton were filed by the administrator with the original petition and how he became possessed of them is unexplained, and a sale was ordered before Carlton had answered in the first instance.

By an examination of the cross-bill it will be perceived that the allegations thereof are insufficient to authorize the relief sought. It is alleged that intestate had not paid off said notes in his lifetime, but it is not alleged that they had not been paid since his death, nor that they were then due and owing. Furthermore, Carlton neither alleges that he is willing to make a title to the lot, nor that he has title and is able to make it to appellant.

This court has repeatedly held that a vendor seeking a specific execution must allege a readiness and an ability to execute it on his part and tender a deed. Therefore, for the errors pointed out in the proceedings, the judgment must be reversed and the cause remanded with directions for further proceedings consistent herewith.

Mensies & Furber, appellant.

Dawson, for appellee.

LAURA L. EVANS v. JAMES H. LEECH, EXR.

Husband and Wife—Marriage of Debtor with Creditor—Debt Released in Law—Equity Changes the Rule.

The marriage of a creditor with her debtor releases the debt in law, on the principle that husband and wife are one person, but equity so far qualified this rule as to permit a feme sole to hold and enjoy her property.

APPEAL FROM CALDWELL CIRCUIT COURT.

November 10, 1871.

OPINION BY JUDGE PETERS:

By the marriage of appellant with her debtor, the debt was released in law, on the principle that husband and wife are but one person; but equity so far qualified this rule of law as to permit a *feme sole* to hold, and enjoy property to her sole use, as where property is given to her for her sole use, or where

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other expressions are used, showing that a gift is intended for the separate use of the wife. The money for which the note was given belonged at the time to Mrs. Evans, and if her husband, after the marriage, had agreed to pay it to a trustee for her separate use the contract would have been binding in law. And if there had been an agreement by the husband to pay the amount of the note to his wife, being based on the consideration that the money was hers, a court of equity would enforce the agreement, but in this case no agreement or provision on the part of the husband is alleged. The averment is that he always intended to pay it. That is only a conclusion of law. Facts should have been alleged constituting an agreement or contract to pay. A mere intention is not sufficient.

Wherefore the judgment is *affirmed*.

Marble, for appellant.

Darby, for appellee.

JAMES B. ENGLISH v. KULP & COLLINGS.

Evidence—Commissioner's Report as Evidence—Exceptions.

The commissioner's report was offered to be read as evidence on the trial, which was objected to and overruled, and the court refused to dispose of the exceptions to the report, to which no exceptions were taken, thereby the objections to the ruling of the court, permitting the report to be read, were waived. As the whole matter was referred to the jury, the evidence upon which the report was based as well as the report itself, it was the province of the jury to give such weight to the whole as they deemed it merited.

APPEAL FROM BULLITT CIRCUIT COURT.

June 22, 1871.

OPINION BY JUDGE PETERS:

Appellant insists that the court below erred in admitting as evidence before the jury the report of the state of accounts between the parties made by the commissioner to whom the case was referred and which had been returned and filed before the trial commenced.

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When said report was offered by the attorney for appellees as evidence appellant's counsel objected to the introduction and reading it to the jury. The court overruled the objection, and then, instead of excepting to the opinion of the court overruling his motion and permitting said report to be read, he moved the court to dispose of the exceptions theretofore filed to said report, which the court declined to do, and he excepted to the refusal of the court to dispose of said exceptions, and waived thereby his objections to the ruling of the court permitting the report to be read. As the whole matter was referred to the jury, the evidence upon which the report was based, as well as the report itself, it was the province of the jury to give such weight to the whole as they deemed it merited, and was proper.

No other objection was made as to the competency of evidence during the progress of the trial.

All the instructions given for appellees appear to be guarded by proper qualifications, requiring in all that at the time of the trade in order to find for the plaintiffs the jury should believe from the evidence that appellant had a knowledge of the state of the accounts of the firm which of the appellees had, that he concealed the true condition from them, and neither of them had a reasonable opportunity of being informed on the subject, and in one the jury were told in substance that they must find for the defendant unless they believed from the evidence that the books of the firm did not show the true state of the accounts of the partnership and which appellant knew at the time, and fraudulently concealed from each of the appellees. And all the instructions asked by appellant were given without any modification so that the law applicable to the case was given as favorably for appellant as he has a right to ask it. And this court is not authorized to say that the finding of the jury is so palpably against the weight of evidence as to enable it to interfere and set aside. It does appear from the evidence that the price agreed to be paid by appellees for appellant's part of the firm assets was considerable more than they were worth, and it was the province of the jury to determine from all the facts and circumstances how the thing was accomplished, whether fair or fraudulent.

Judgment must be *affirmed*.

A. H. Field, for appellant.

R. H. Field, for appellees.

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J. A. GOODE'S ADMR. v. ELIZABETH GOODE.

Executions—Sale of Land—Transfer by Purchaser.

By the sheriff's sale, the equity of the intestate in the land passed and by the transfer to Banister of Moore's purchase he acquired the equity and when Mrs. Goode paid Banister for it she in equity was substituted to all his rights.

Vendor and Purchaser—Parol Sale of Land—Objection.

The parol evidence of the sale of the land was not objected to and if it had been the judgment and execution under which the sale was made would have been produced. The objection to the evidence comes too late, when it is made for the first time in the court of appeals.

APPEAL FROM MARION CIRCUIT COURT.

December 18, 1871.

OPINION BY JUDGE PETERS:

By the evidence it is shown that the land claimed by appellee was sold by virtue of an execution against her late husband, the intestate, and the witness, Moore, purchased it at the sheriff's sale; that he transferred the benefit of his purchase to Banister, and he transferred, by parol *it may be, the benefit of the same to appellant*, or to her and her husband, but however that was, it is very clear that appellee paid Banister for it, in part by conveying to him the land she inherited from her father, Mr. McCarty, and the residue out of money she had deposited in the Commercial Bank at Lebanon; that money she deposited in the bank as early as April, 1863, and paid to Banister the difference between the price of the land in controversy and what he allowed for her land out of the fund deposited in said bank.

By the sheriff's sale the equity of intestate in the land passed, and by the transfer to Banister of Moore's purchase he acquired that equity, and when Mrs. Goode paid Banister for it, she, in equity, was substituted to all his rights.

The parol evidence of the sale of the land was not objected to; if it had been it can scarcely be questioned that the judgment and execution under which the sale was made would have been produced. The objection to the evidence comes too late, when it is made for the first time in this court.

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As therefore appellee has paid for the land the court properly adjudged it to her, and directed the sheriff who made the sale to convey it to her.

Wherefore the judgment is *affirmed*.

W. B. Harrison, for appellant.

Noble, for appellee.

JOHN T. FACKLER *v.* JAMES C. FACKLER.

Will—Trust During Life—Remainder not Disposed of.

By the will of the testatrix, a trust was created for the benefit of her daughter for life and at her death the estate was to go to her issue, but no disposition was made of the remainder. In the event the daughter has no issue she takes the remainder in fee, as heir at law of her mother.

APPEAL FROM BOYLE CIRCUIT COURT.

October 5, 1871.

OPINION BY JUDGE PETERS:

The husband of the testatrix, for whom she provided in her will, having died before she died, and upon her death by the terms of her will a trust was created for the benefit of her daughter, the appellee, during her life, and at her death the estate was to go to the issues, or descendants, of her said daughter. But the testatrix made no disposition of the estate in remainder in case her daughter died without issue or descendants, and in that event as to the estate in remainder she died intestate, and it would pass to her heirs. Consequently her daughter took a defeasible fee in it; to be defeated in the event that appellee should leave issue, as descendants surviving her, who will take it. Under this view of the case, sustained by authority and analogy, we think the judgment of the court below is as favorable to appellant as he had a right to ask it, and he has no cause of complaint.

Wherefore the judgment is *affirmed*.

Vanwinkle, for appellant.

Durham & Jacobs, for appellee.

Opinion of the Court.

JAMES FOXWORTHY'S HEIRS v. W. W. TRIMBLE, ETC.

Attorney and Client—Attorney as Party Plaintiff—Counsel for Adversary
—Not Entitled to Fee.

Trimble was one of the original plaintiffs and his personal interest was antagonistic to that represented by the administrator. Under such circumstances it was impossible for him to have protected his individual interests and at the same time discharge his duty as counsel to one of his adversaries.

APPEAL FROM HARRISON CIRCUIT COURT.

June 10, 1871.

OPINION BY JUDGE LINDSAY:

The plea of limitation as to the judgment rendered in 1866 is sustained and the appeal as to that judgment dismissed. We see no reason for disturbing the order directing the commissioner to convey the land sold under the original judgment to the purchaser, Cladwell. Besides, the latter is no party to this appeal, and we can take no action in the premises by which his rights would be affected.

We are, however, of the opinion that the allowance of one hundred dollars to Appellee Trimble in the way of an attorney's fee for representing the administrator of Foxworthy in this litigation can not be sustained.

It seems that Trimble was one of the original plaintiffs, and his personal interest was necessarily antagonistic to that represented by the administrator. Under such circumstances we do not well see how it is possible for him to have protected his individual interests and at the same time discharge his duty as counsel to one of his adversaries.

Wherefore said order is reversed, and, upon the return of the cause, the court below will set the same aside, and hold it for naught.

Ward, for appellants.

Trimble, Boyd, for appellee.

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HENRY GREEN *v.* JOHN DAVIS.**Appeals and Errors—Proceedings of Court of Appeals—How Proved.**

The proceeding of the court of appeals can only be proved by a properly attested copy of its records.

APPEAL FROM SCOTT CIRCUIT COURT.

September 30, 1871.

OPINION BY JUDGE LINDSAY:

Whether or not the pendency of the appeal in the case of *Commonwealth and Wilson v. Davis and Others* in this court would interpose a bar to the right of Davis to recover against Green is not necessary to determine. The onus was upon Green to sustain his defense by legal evidence. There is no evidence in the record tending to show that any such appeal was pending except a paper purporting to be a copy of a summons issued by the clerk of this court. Such paper was wholly incompetent to prove any such fact. The proceedings of this court can only be proved by a properly attested copy of its record. The credit allowed Green is sufficiently specific.

Judgment affirmed.

Polk, for appellant.

Robinson & Stevenson, for appellee.

W. J. GILLISPIE *v.* B. C. STAGNER, ETC.**Evidence—Records in Other Suits—Failure to Copy in Bill of Exceptions.**

None of the papers are copied into the bill of exceptions or made part of this record. The clerk in a note suggests that there is a copy of the record of the case of Stagner *v.* Gillispie on file in the court of appeals but there is no agreement that the same may be considered on this appeal as part of the record.

APPEAL FROM GARRARD CIRCUIT COURT.

September 13, 1871.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

It appears from the bill of exceptions that upon the trial of this action the appellant introduced and read to the court the record with all the orders and steps taken therein, the case of *B. C. Stager v. W. J. Gillispie and John Arnold* and that the plaintiff then introduced and read to the court a *fi. fa.* in said case for the sum of thirty dollars, etc. Also, the sheriff's indorsement thereon.

None of the papers are copied into the bill of exceptions or in any other legal manner made part of this record. True, the clerk in a note suggests that there is a copy of the record of the case of *Stagner v. Gillispie, etc.*, on file in this court, but there is no agreement that the same may be considered on this appeal as part of this record.

Not having before us all the evidence heard by the circuit judge, we cannot adjudge that his decision was erroneous.

Judgment affirmed.

Bradley, for appellant.

McKee, for appellees.

THOMAS GREER v. THOMAS FLEMING.

Bills and Notes—Partnership—Note Merges Account—Void Note.

Appellant could not repudiate the note because it was executed after the dissolution of the firm and also rely upon it as a bar to the action on the account. If the note was void the account was not merged.

APPEAL FROM KENTON CIRCUIT COURT.

September 22, 1871.

OPINION BY JUDGE LINDSAY:

Hunter was a competent witness in behalf of appellee. *Todd v. Luckett*, 18 B. Monroe 130. Besides this, the books of I. G. Hunter & Co., which were introduced by the appellant, sufficiently establish that he was a member of the firm at the time the coal is proven to have been delivered by the witness Patterson.

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The court properly allowed the amended petition to be filed. Appellant could not repudiate the note, because it was executed after the dissolution of the firm, and also rely upon it as a bar to an action on the account for the coal. *Daniel v. Toney, 2nd Metcalfe* 524.

If the note was void, then the account was not merged; if it was not, then appellee was entitled to judgment on his original petition.

Perceiving no available error, the judgment is affirmed.

Benton, for appellant.

Carlisle, for appellee.

THOMAS GRUBBS' EXR. v. W. C. & THOMAS H. SATTERFIELD.

Will—Power of Executor to Sell and Convey—May Complete Sale by Testator.

Where an executor has power under the will to sell and convey real estate, he may complete by conveyance any sale made by the testator and his deed will vest the purchaser with a perfect title to the land.

APPEAL FROM BATH CIRCUIT COURT.

October 11, 1871.

OPINION BY JUDGE LINDSAY:

The title of Grubbs to the land sold to Satterfield seems to be unexceptionable.

The executor had full power under the will of Grubbs to sell and convey all lands of which he died seized, or in which he owned any interest, except such as were specifically devised. Having the power to sell and convey, there can be no doubt but that he would also complete by a conveyance any sale made by his testator. The executor's deed to Satterfield vested him with a perfect title to the land, and was all he had the right to require.

The execution of the note sued on is strong, presumptive evidence that there was at its date due and owing by Satterfield

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to Grubbs the full amount thereof. This presumption must be overcome by a preponderance of testimony before Satterfield should be allowed to escape the payment of the note.

We are of opinion that the evidence in this case is insufficient to establish the fact that the larger part of the debt due from appellee to Grubbs had in point of fact been paid when the note was given. There is no reason why the credit for \$1,600, the amount agreed to be paid by Dennis for the two hundred acres of land he was to get, should not have been deducted from the aggregate amount owing to the purchase before the note was given, and from the evidence of Stephens and Brown we entertain no doubt but that it was.

Stephens says that the agreement at the time was that this \$1,600 was to have been credited on the bond, originally executed in duplicate between Grubbs and Satterfield, but that the bond could not be found. It was certainly not the note that was lost, because it was then being executed. But doubtless the reason why Satterfield was so anxious to have this credit entered on the bond was that the creditors, together with the others, and the note he was then executing would cover the amount of the bond and extinguish the indebtedness thereby evidenced. Brown says that afterwards, when he heard the parties canvassing the state of their accounts, this \$1,600, with other amounts he recollects with great distinctness, amounted to about \$2,199, and that Satterfield was entitled to a credit of that amount. To this sum add the amount of the note and the sum approximates five thousand dollars, the price originally agreed to be paid for the land.

There is some evidence conducing to show that Satterfield had let Grubbs have small lots of cattle, mules and hogs. The value of this stock doubtless went to discharge the accrued interest on the original price of the land, and to make up with the \$1,600 the \$2,199 credit of which the witness Brown speaks.

From the evidence of Bradshaw we are inclined to think that the amount of the judgment in favor of Grubbs v. Bradshaw and Satterfield—\$810.31—should be credited on the note sued on as of date October 31, 1860. The hog contract, it is true, was made and violated before the execution of the note, but the payment of the judgment was afterwards. It is evident this amount was

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not deducted when the note was given, and Bradshaw is positive that the hogs were to have been delivered as a payment on the land. Except as to this credit the judgment should have been for the full amount of the note, and the vendor's lien enforced.

We are, however, of opinion that the plea of infancy interposed by James H. Satterfield was sustained by the evidence and that no judgment should have gone against him.

To the extent indicated and for the correction alone of the errors pointed out, the judgment is reversed on the appeal as to W. G. Satterfield and remanded for further proceedings. It is also reversed on the cross-appeal as to James H. Satterfield and cause remanded with instructions to dismiss as to him.

Winn, Hazelrigg, Lacy, for appellants.

Nesbitt & Gudgall, for appellee.

A. A. GOODSON v. SAMUEL STEPHENS.**Election of Remedies—Plaintiff Must Stand by his Selection.**

The plaintiff, having deliberately elected to proceed upon the second paragraph of his petition, it was not an abuse of the court's discretion to refuse to permit him, after the testimony was heard, to amend his pleading and rely upon the matters set out in the first paragraph of his original petition.

APPEAL FROM ANDERSON CIRCUIT COURT.

October 20, 1871.

OPINION BY JUDGE LINDSAY:

The court below did not err in requiring the appellant to elect which one of the causes of action set out in his petition he would prosecute. The two were not only inconsistent, but each one presented a perfect defense to the other and might have been plead in bar of a recovery.

Having deliberately elected to proceed upon the second paragraph, knowing, as he must have known, that a former judgment between the same parties, rendered in an action involving

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identically the same subject-matter, could be plead as a bar to his suit, and being fully apprised as to the proof he would be able to make by his witness McBrayer, who had testified in the former suit, it was not an abuse of the court's discretion to refuse to permit him, after the testimony was heard, to amend his pleading, and rely upon the matters set out in the first paragraph of his original petition.

Judgment affirmed.

Felix & Thompson, for appellant.

———, *for appellee.*

WILLIAM GRESHAM v. RICH P. GRESHAM.

Ferrie—Motion to Establish—Conflicting Claims.

Both parties assumed that a legal ferry already existed at or near the point proposed, and the ground of controversy is as to which of them owns the privilege. Such a question as this cannot be settled in a proceeding commenced in the county court upon a motion to establish a new ferry.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

October 28, 1871.

OPINION BY JUDGE LINDSAY:

This was a motion by appellant in the County Court of Rockcastle for the establishment of a ferry across Rockcastle River and the granting of the ferry privilege to him.

Before the motion was disposed of in the County Court it was by consent of the appellee, who had entered his appearance, transferred to the Circuit Court of said county.

There is no evidence in the record tending to show that the convenience of the traveling public demands or requires that the proposed ferry shall be established.

Both parties assume that a legal ferry already exists, at or near the point proposed, and the ground of controversy is as to which of them owns the privilege. Such a question as this can not be settled by a proceeding commenced in the County Court upon a motion to establish a new ferry.

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The Circuit Court rightly dismissed the motion. Judgment affirmed.

A. J. Moore, for appellant.

C. Kirtly, for appellee.

WILLIAM FRENCH *v.* W. H. FRENCH'S HEIRS.

Ejectment—Notice to Quit—Proof of.

The petition alleges that possession had been frequently demanded and refused, and it appears that appellant disowned his tenancy and claims against the appellees before the institution of this suit. This hostile claim upon his part exonerated the appellees from the necessity of giving him notice.

APPEAL FROM FRANKLIN CIRCUIT COURT.

September 8, 1871.

OPINION BY JUDGE LINDSAY:

The verdict and judgment in this case are certainly not so palpably against the weight of the evidence as to authorize the interference of this court.

We do not perceive that the court erred to the prejudice of appellant in giving the instructions asked for by appellees.

The second instruction is, in our opinion, more favorable to appellant than it should have been. The facts that appellant lived upon the land in controversy and received the rents and profits are given undue prominence of being selected out as strong evidence of ownership to be rebutted only by the further fact that during all that time he held the same under his son, and not adverse and hostile to the latter's title.

The fifth instruction asked for by appellant was properly refused. It was not necessary to prove notice to quit.

The petition alleges that possession had been frequently demanded and refused, and it clearly appears that appellant disowned his tenancy, and claimed against the appellees before the institution of this suit.

This hostile claim upon his part exonerated the appellees from the necessity of giving him such notice. The Revised

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Statutes, in our opinion, do not change the old rule upon this subject. The appellant could not have been prejudiced by the admission as evidence the deed from Dudley to the ancestor of the appellees.

Judgment affirmed.

James, for appellant.

Craddock, for appellee.

R. T. DURRET v. C. J. BOUCHE.

Executions—Failure to Indemnify Sheriff—Return No Property Found—Truth of Return.

The right to require a bond of indemnity is based on the fact that the officer doubts whether or not the property is subject to the levy and sale, and the failure of the plaintiff in the execution to give the indemnity does not lead to the conclusion that the return is false. The creditor's right to resort to equity does not depend on the truth of the return of the officer, but upon the fact that the execution has been returned, "No property found." Such return is conclusive between the parties and its verity cannot be enquired into without making the officer a party.

Fraudulent Conveyance—Property Sufficient to Satisfy Both Debts—Equity of Redemption.

In an action to set aside a conveyance as fraudulent, if the petition shows that the mortgaged property is sufficient to pay both debts, the equity of redemption, only, will be adjudged to be sold to satisfy plaintiff's debt.

Judicial Sales—Equity of Redemption—Purchaser's Bond.

The judgment upon which the equity of redemption in mortgaged property is directed to be sold should require the purchaser to execute a bond, to the effect that the property shall not be removed out of the county, and shall be preserved and forthcoming to answer the incumbrance cited by the mortgage, as in sales of such property under execution.

Liens—Mortgage Lien—Attachment Lien—Mortgagee Must Foreclose.

As the mortgagee's debt is due, she should be required to foreclose her mortgage and if she fails to do so, her lien of the mortgaged property should be disregarded and the property sold to satisfy appellee's judgment.

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APPEAL FROM LOUISVILLE CHANCERY COURT.

June 14, 1871.

OPINION BY JUDGE LINDSAY:

Charles Bouche recovered a judgment in the Jefferson Court of Common Pleas against Durret and Cain for the sum of nine hundred and thirty-two dollars and thirty cents, with interest and costs.

Execution was issued thereon and placed in the hands of the sheriff of Jefferson County, and was in due time returned with this indorsement: "Plaintiff refusing and failing to give the indemnifying bond, I return this *fi. fa.* no property found." Bouche then instituted a suit in equity in the Louisville Chancery Court under the provisions of Section 474 of the Civil Code to enforce the collection of his judgment. Alleging that his execution had been returned in substance "no property found," and calling upon Durret for a discovery of assets, he set up the further fact that on the 20th of April, 1869, four days before the rendition of his judgment, Durret had executed to Mrs. E. T. Bates a mortgage on household and kitchen furniture, books, pictures, musical instruments, etc., to secure the payment of an alleged debt of two thousand dollars that day contracted. He charged that said mortgage was made with the fraudulent design of hindering and delaying creditors, and having made Mrs. Bates a party defendant, prayed that the same be set aside and the mortgaged property subjected to the payment of his judgment. He also sued out an order of general attachment which was levied on the property embraced in the mortgage.

Durret and Mrs. Bates each answered, denying all fraud in the execution of the mortgage, and on the hearing the chancellor rendered judgment subjecting Durret's equity of redemption in the mortgaged property to the payment of Bouche's judgment, and Durret brings the case to this court by appeal.

It is insisted that the court had no jurisdiction and that this fact appears upon the face of Bouche's petition. The Code of Practice gives the judgment creditor the right to resort to equity for relief. "After an execution of *fieri facias*, directed to the county in which the judgment was rendered, or to the

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county of the defendant's residence, is returned by the proper officer, either as to the whole or a part thereof, in substance, no property found to satisfy the same." Civil Code, Section 474.

In this case there can be no doubt but that the sheriff did return the execution "no property found." It is true that he couples with this return the fact that the plaintiff had failed to give an indemnifying bond, but it does not necessarily follow from this that the defendant had property subject to execution upon which he might have levied.

By Section 709 of the Civil Code an officer who is required to levy an execution on personal property and who doubts whether it is subject to execution may require a bond of indemnity.

The right to require the bond is based upon the fact that the officer doubts whether or not the property is subject to levy and sale, and this doubt, strengthened by the refusal or failure of the plaintiff in the judgment to give the indemnity, certainly does not lead to the conclusion that the return of *nulla bona* is false. If it did we do not see that this would prevent the creditor from resorting to equity. His right does not depend upon the truth of the return of the officer, but upon the fact that his execution has been returned, "either as to the whole or a part thereof in substance no property found to satisfy the same." Such return is conclusive between the parties unless procured by the fraud of one of them, and its verity can not then be inquired into without making the officer a party. *Shoffet v. Meniffee*, 4 Dana 150.

The appellee upon his cross-appeal complains that the court erred to his prejudice in not adjudging the conveyance to Mrs. Bates fraudulent and void, and subjecting the property itself instead of Durret's equity of redemption therein to the payment of his debt.

We deem it wholly unnecessary to inquire into this branch of the case, as the petition of appellee shows that the mortgaged property is amply sufficient to pay both his and Mrs. Bates' debt. The only objection to the judgment upon which appellant can rely for a reversal is the fact that it does not require the purchasers of the equity of redemption in such of the mortgaged property as may be sold, to give bond; that the same shall not be removed out of the county, and shall be preserved and forthcoming, unavoidable accidents excepted, to answer the encum-

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brance created by the mortgage, as required in cases of sales of such property under execution. (Sec. 4, Art. 15, Chap. 36, Revised Statutes.)

Whilst we would not be understood as deciding that courts of equity are restricted in their action in making sales of encumbered property by all the limitations imposed upon officers enforcing judgments at law, still good reasons exist for requiring the purchasers of the equity of redemption in such property at sales made by the chancellor, to secure by proper bonds, its return, when the mortgage or other contract creating the encumbrance may be enforced. For this reason, and in view of the fact that it can not possibly damage the appellee, the judgment must be reversed.

As Mrs. Bates' debt is now due, upon the return of the cause she should be required either to foreclose her mortgage in case the court adjudges the same to be valid, or if she fails or refuses to do so, her lien upon the mortgaged property should be disregarded and such portion of the same as may be necessary be sold in satisfaction of appellee's judgment. If the mortgage of Mrs. Bates is held to be valid and she asks that the same be foreclosed, of course, her debt should be first paid out of the proceeds of the mortgaged property. Upon the cross-appeal the judgment is affirmed.

Bramlette & Durrett, for appellant.

Allnut, Beattie, Harlan, for appellee.

POLLY DANIEL'S DEVISEES *v.* HENRY DANIEL.

Will—Devise to Wife—Separate Estate.

Polly Daniel was twice married and all the estate owned by her at the time of her death she derived under the will of her first husband. The second clause of the will is in these words: "After the payment of my just debts as above directed, I will and devise to my wife, Mary Cravens, an equal half of my entire estate, real, personal and mixed, and she is to have the said half of my estate hereby devised to her, to do with and dispose of as she may please."

Held, that the language used by the testator excludes the idea that it was his intention to settle the property devised to his then wife to

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her separate use and benefit to the exclusion of any husband that she might thereafter have.

Husband and Wife—Antenuptial Contracts—Separate Estate.

The language of the antenuptial agreement indicates that all the estate then owned or might afterward be acquired by the wife, whether real or personal, was intended to be embraced in the contract, but the conveyance to the trustee made for the purpose of carrying the agreement into effect, conveyed only such personal property as she then owned or might afterwards acquire.

Held, that the realty did not pass by the deed to the trustee.

Will—Power of Married Woman to Dispose of Separate Estate—Change from General to Special Estate by Feme Sole.

A married woman can dispose of, by will, only such estate as is secured to her separate use by deed or devise, or in the exercise of a special power to that effect. The devise from the first husband did not secure to her a separate estate in the property she acquired thereunder. Her estate was changed from general to special by her own acts, therefore she had no power to dispose of such estate by will.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 27, 1871.

OPINION BY JUDGE LINDSAY:

On the 5th day of March, 1860, Polly Daniel, then the wife of the appellee, Henry Daniel, without the consent of her husband, attempted to make a last will and testament disposing of her entire estate. Shortly after her death the writing was offered for probate in the Montgomery County Court, and rejected. The persons named in the paper as devisees prosecuted an appeal to the Circuit Court of that county, and upon hearing the judgment of the County Court was affirmed. From this last judgment an appeal has been prosecuted to this court.

The only question necessary for this court to determine is whether Polly Daniel had the right, under the laws of Kentucky, to dispose of her estate by will.

Section 4, Chapter 106, Revised Statutes, provides that "a married woman may, by will, dispose of any estate secured to her separate use by deed or devise, or in the exercise of a special power to that effect."

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Polly Daniel was twice married, and all the estate owned by her at the time of her death she derived under the will of her first husband, William Cravens. The second clause of said will is in these words: "After the payment of my just debts, as above directed, I will and devise to my affectionate and beloved wife, Mary Cravens, an equal half of my entire estate, whether real, personal or mixed, and she is to have the said half of my estate hereby devised to her, to do with and dispose of as she may please." Except for the concluding portion of this clause, there could be no doubt but that the devisee took the absolute title to the estate devised, free from any limitation or restriction.

It is insisted for appellants that the language used by the testator must be given some effect if possible, and that if the words, "to do with and dispose of as she may please," are considered at all, they must be regarded as evidencing an intention upon the part of the testator that his wife was not only to hold the estate free from the control of any one during the time that she might remain a widow, but that the same right "to do with and dispose of" such estate was to exist as against any future husband. The difficulties in determining whether or not estates, held by married women, are separate or general, grows not so much out of uncertainty as to the rule by which courts are to be governed, as in the application to each particular case of a rule of construction about which there is no substantial difference of opinion.

The intention that the estate should be taken and held by the *feme* as separate estate, should be clearly and distinctly expressed. The husband should be excluded from the exercise of such rights over the estate of his wife as would otherwise inure to him by virtue of the marital relation, by language unequivocally manifesting such a design, or else there should exist some provision regulating the enjoyment of the estate wholly incompatible with any rights by him to control it in any manner. *Johnson v. Furgeson*, 2 Met. 508; *Toombs v. Stone*, *Ib.* 521; *Hutchinson v. James*, 1st Duvall 76; *Bowen v. Sebree*, 2 Bush 115.

The application of these principles to the language used by William Cravens seems to—is to—exclude the idea that it was his intention to settle the property devised to his then wife, to her separate use and benefit to the exclusion of any husband

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that she might thereafter have. There is nothing in his will indicating that he contemplated the second marriage of his wife. He died without children. Such of his estate as he did not give to her was devised to his nephews and nieces. The magnitude of the gift to the wife evidenced a desire upon the part of the husband to deal generously with her, and we conclude that he expressed his intention that she should take the estate, devised to her to do with and dispose of as she pleased, to manifest clearly and unmistakably the fact that her title thereto was to be perfect and complete. We are aware that in one or two cases language scarcely more certain and unequivocal than that used by the testator, Cravens, has been held to award a separate estate in the wife.

In those cases, however, the *femes* were married women at the time of the execution of the deed or will under which they claimed, and in each case importance was properly attached to such fact. Here the devise was by the husband, and could not take effect until the devisee became discoverd. But even if this important difference did not exist, as each case must depend to some extent upon its peculiar surroundings, we feel free in this instance to adhere closely to well-established principles, believing, as we do, that we thereby effectuate the intention of the testator.

Prior to the marriage of Mrs. Cravens to the appellee Daniel an antenuptial agreement was entered into between them, which is in these words:

"Whereas, a marriage is about to be consummated between Henry Daniel and Mrs. Polly Cravens, both of the County of Montgomery and State of Kentucky, and, whereas, the said Daniel has agreed with the said Polly that whatever property she may have, or may acquire or obtain, by purchase or otherwise, is to be subject to her exclusive use and benefit, and she is empowered to dispose of the same by deed, or by any other way that she may please, and to use it as she may desire; and to carry the above agreement into effect, it is agreed by the said Daniel and Polly of the one part, and William Ragan of the other, as trustee, that the parties of the first part do agree, and the said Polly in particular, to convey all personal property which she may now own, and all that she may acquire in any

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way, to the said William Ragan, his heirs and assigns, forever, for the sole use and benefit of the said Polly, which is to be at her disposal; and she is to have power, with the concurrence and consent of her intended husband, to dispose of said personal property as she may deem proper at any time that she may desire; and for the further consideration of one dollar to the said Polly she does by these presents sell and convey the above personal property in manner and form aforesaid, to the said William Ragan, trustee aforesaid."

Dated June 21, 1855, and signed by Henry Daniel, and Polly Ragan. Said agreement was properly acknowledged and recorded, and the trustee, Ragan, accepted the trust.

There can be no doubt but that this instrument invested Mrs. Daniel with a separate estate in the property therein conveyed. But it is equally clear that as to the personal property she then had or might thereafter acquire her power of disposal, either by sale, gift or will, was made to depend upon the "concurrence and consent of her intended husband." The paper is obscure as to what the intention of the parties were as to the real estate then owned by Mrs. Daniel. It recites that "the said Daniel has agreed with the said Polly that whatever property she may have or may acquire" is to be subject to her exclusive use and benefit, and she is to have the right to dispose of it by deed, or in any other way she may please.

This language indicates that all estate she then owned or might afterwards acquire, whether real or personal, was intended to be embraced by the agreement, but the conveyance to Ragan made for the purpose of carrying this agreement into effect conveys only such personal property as she then owned or might afterwards acquire. Considering the entire paper, we regard it as a matter of great doubt as to whether a conveyance of her real estate was intended or contemplated. We are inclined to the opinion that the realty did not pass by the deed.

There is still another view of this case. Under our statute a married woman can dispose by will of only such estate as is "secured to her separate use by deed or devise, or in the exercise of a special power to that effect." Mrs. Daniel had no such special power. As we have already seen, the devise from the husband did not secure to her a separate estate in the property

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she acquired thereunder. Her estate was changed from general to special estate by her own act whilst a *feme sole*. The letter of the statute empowering married women to dispose by will of certain separate estate does not embrace, such as is created by the act of the *feme* herself, and whilst we concede that the statute should receive a fair and liberal construction, it ought not by implication to be extended to any other estate than can be legitimately brought within its provisions.

The seventeenth section of Article 4, Chapter 47, Revised Statutes, as originally adopted, inhibited married women from alienating real or personal estate conveyed or devised to them for their separate use, with or without the consent of their husbands. It is this exact character of estate that they are empowered to dispose of by will. This court in construing this section held that "the estate which a *feme sole* owns in her own right by descent or purchase, and which by antenuptial contract she secures for her sole use and benefit, as her separate estate, to the exclusion of her husband, is not embraced in the provisions of the Revised Statutes, Chapter 47, Article 4, Section 17." Stites, Judge. *Bryan v. Bohannon*. M. S. S. opinion, December, 1856.

This decision seems to be conclusive as to the construction that should be placed upon the statute relating to married women's power to dispose of their separate property by will.

It does not in the slightest degree conflict with the opinion of this court delivered during this term in the case of *Harris of Colorado v. Griffin*, etc. Mrs. Griffin acquired her separate estate by deed from her husband, and it was held that the fact that this property was afterwards sold and reinvested did not change the nature of her estate in the property thereby acquired, although the technical words necessary to create a separate estate were omitted from the last deed.

For the reasons given we are of the opinion that Mrs. Daniel had no power to dispose of her estate by will. The judgment of the Circuit Court is therefore affirmed, and the cause remanded for such further orders as may be necessary and proper in the premises.

Judge Peters did not sit in this case.

Apperson & Reid, for appellant.

Breckenridge & Buckner, Simpson, Turner, for appellee.

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POLLY DANIEL'S DEVISEES *v.* HENRY DANIEL.**Husband and Wife—Separate Estate—Power to Dispose of By Will.**

A wife may dispose of her separate estate secured to her by an antenuptial contract when she reserves the right so to do.

Reports—Unreported Opinions as Authority.

The case of *Bryan vs. Bohannon* is regarded as authority, although it was not published in the reports of the decisions of the court of appeals.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

December 21, 1871.

OPINION BY JUDGE LINDSAY:

A careful examination of the authorities cited in the petition of appellants for a rehearing, has not satisfied us that the opinion of the court is not in perfect accord with the law of the case. We do not decide that the wife may not dispose of by last will and testament, the property secured to her separate use by antenuptial contract, when she reserves the right to do so. It is not necessary that all should express an opinion upon this subject. Mrs. Daniel did not reserve to herself such right in her contract with appellee. The legislature saw proper when the Revised Statutes was adopted to specify the character of separate estate a married woman might dispose of by will. The express grant of power over estates of this kind acquired by deed or devise, excludes the idea that such power exists over the same kind of estates acquired in other modes.

The common-law rule must yield to the statutory limitation.

We regard the case of *Bryan v. Bohannon* as authority although it was not published in the reports of the decisions of this court. The cases cited do not satisfy us that Mrs. Daniel took a separate estate in the property devised to her by her first husband, Cravens, nor do they conflict with the rule of law as announced in our opinion.

We cheerfully concur with counsel that the draftsman of the will, Mr. Fanon, was an accomplished lawyer, and was not likely to use unusual or unnecessary words in passing to Mrs. Daniel the fee simple title to the property devised, but we are also sat-

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ified that he understood the character of language necessary to be used in creating a separate estate, and feel assured that if such had been the intention of the testator, apt words for that purpose would have been used and nothing left for construction.

The petition for rehearing must be *overruled*.

A. J. DAVIS, ETC., v. E. B. OWSLEY, ETC.

Appeals and Errors—Errors of Law at the Trial—No Evidence to Sustain Verdict.

It is immaterial whether the court erred or not in giving the law to the jury when there is no evidence to sustain a verdict, if it had been rendered for the plaintiff.

APPEAL FROM JEFFERSON CIRCUIT COURT.

June 15, 1871.

OPINION BY JUDGE—————

The instructions and rulings of the court on the conclusion of the evidence in this case seemed to have been correct, but whether they were or not we are satisfied that the evidence did not authorize a verdict for the plaintiff, nor was it such as to have sustained such a verdict if it had been rendered; on the contrary, the court might properly have given the peremptory instruction to find for the defendants, which was asked at the conclusion of the evidence for the plaintiff. According to a well settled rule, therefore, the judgment ought not to be reversed whether the court erred or not in its ruling as to some questions of law which by the failure of evidence to sustain any verdict for the plaintiff is now rendered immaterial.

Wherefore the judgment is *affirmed*.

Brown, for appellants.

Bodley & Sumrall, for appellees.

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MARION GRAVES *v.* JAMES THOMPSON.**Execution—Sale Under—Separate Lots of Land Must be Sold Separately.**

It was the duty of the sheriff to sell the several lots of land separately as they were separated by distinct metes and bounds and containing not less than fifty acres and the written direction to sell the real estate instead of personal property, conferred no authority to sell the land as one tract.

Execution Sale—Time to Redeem—Sale of Redemption Right.

The fact that the time to redeem land sold under an execution has expired, does not affect the right of the execution debtor to have the sale set aside for irregularities, where the right of redemption has been sold under another execution before the time to redeem under the first sale has expired.

APPEAL FROM MASON CIRCUIT COURT.

June 17, 1871.

OPINION BY JUDGE PETERS:

A large number of executions having been issued from the clerk's office in Mason county on the 11th of September, 1860, against the estates of Eldred M. Graves and others were placed in the hands of the sheriff of said county, and were by him levied on several tracts of land owned severally by the defendants in said executions except Elijah Loyd, of whom appellant was one, by their written directions to said sheriff instead of slaves and other personal estate.

Of the tracts of land thus levied on, appellant owned one containing 55 acres set apart to her on the partition of the real estate left by her father by commissioners to make said partition by distinct metes and bounds, designated as lot No. 2 on the plat of said division, also lots Nos. 3 and 4 were levied on, being two lots set apart by said commissioners at the same time to two other heirs of her father.

These lots of land were appraised separately by appraisers appointed for the purpose, and appellant's lot was appraised at \$55 per acre, five dollars on the acre more than either of the other lots. And on the 11th of November, 1860, these three several lots were sold at the same time as one tract by the sheriff to satisfy said executions, and did not sell for three-fourths of their appraised value.

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In January and June, 1861, several executions issued from the same office in favor of various persons and against several defendants in each execution; but of those which then issued, appellant was defendant in but one—that was in favor of John S. Mitchell, administrator of John Mathers for \$395, and six per cent interest thereon from the 10th day of June, 1860, till paid; \$1.15 costs. A part of these executions for which the one in favor of Mitchell, administrator, as aforesaid, and for which she was bound, were all levied on the equity of redemption in lot No. 2, which was appellant's, and lots Nos. 3 and 4, which had been sold on the 12th of November, 1860, as aforesaid, and on the 11th of November by the sheriff under said executions all together, and the same sold for \$22.25 per acre, which satisfied the debts under which they were sold, including 21 acres, 2 rods and $30\frac{1}{4}$ poles of appellant's land, and appellee having paid to Ryan, who was the purchaser of the land at the sale of November, 1860, the price he paid for the same, took the sheriff's deed for the land of appellant, and having gotten the possession thereof, this suit in equity was brought by appellant to set aside the sale of her land, or to permit her to redeem the same on equitable principles.

The court below dismissed her petition, and she has appealed to this court.

It was certainly the duty of the sheriff to sell the several lots of land separated as they were by distinct metes and bounds, and containing in each lot not less than 50 acres separately, and especially was it his duty to so sell in view of the fact that appellant's lot was of greater value than either of the others. And the written direction to sell the real estate instead of slaves, conferred no authority to sell the land as one tract; but while that perhaps would not of itself be sufficient to set aside the sale, we do not perceive how the sale of the equity of redemption can be sustained. Appellant's land was evidently sold for debts she did not owe; the sheriff had no power to sell more of her land than would satisfy the debt for which she was bound. This irregularity or excess of authority must be fatal to the sale, and is such that the purchaser must take notice of. Nor can the fact, that the time to redeem her land was expired, affect her right to the relief she seeks; she had till the latest convenient hour of

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the 11th day of November, 1861, to redeem; before that hour had arrived, her land was sold and she was thereby deprived of the right. But appellee being without fault in the matter, should be protected, and should have a lien on the land for the money he has paid out on appellant's portion of the debts.

Wherefore, the judgment is reversed and the cause is remanded with directions to refer the case to the master to ascertain and report the proportion of the debts for which appellant's land was sold at both sales would be with interest since the last sale, to ascertain what is a fair rent for the land since appellee has had the same in possession, and whether or not appellee has made improvements on the same of a lasting and valuable character, and what is the enhanced value of the land by said improvements, and for further proceedings consistent herewith.

H. Taylor, for appellant.

Phister, for appellee.

CROTENKEMPER & Co. v. HILL & SMITH.**Equity—Order of Submission—Failure to Except.**

Appellants did not except to the order of submission and in the absence of such fact it cannot be assumed that they were thereby prejudiced.

APPEAL FROM KENTON CIRCUIT COURT.

September 23, 1871.

OPINION BY JUDGE LINDSAY:

Appellants did not except to the order of submission in this case. They did not ask a continuance, nor suggest to the court that they desired further time for preparation. In the absence of any such facts we cannot assume that they were prejudiced by the action of the court below.

The mandate of this court directed an adjustment of the accounts between the parties upon substantially the theory insisted upon by the appellants in their pleadings, and with a view to which they had prepared the case.

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The evidence fully sustains the action of the court in rendering the judgment complained of.

We perceive no available ground for a reversal.

Wherefore the judgment is affirmed.

Fisk, for appellant.

Stevenson & Myers, for appellee.

SUE R. HUGHES v. W. H. HUGHES, ETC.

Husband and Wife—Sale of Wife's Real Estate—Wife's Equity—Rights of Creditors.

Where the wife's claim is a mere equity and there is no legal demand to which she can be substituted, such a claim cannot be enforced to the prejudice of her husband's creditors, for this reason her claim is not embraced in the statute providing for the settlement of insolvent decedent's estates, making all debts and liabilities of equal dignity and payable ratably.

APPEAL FROM GALLATIN CIRCUIT COURT.

May 18, 1871.

OPINION BY JUDGE PETERS:

This suit was brought in June, 1867, by appellant, an administratrix of her late husband, A. G. Hughes, alleging that the personalty was insufficient to pay the debts of her intestate, praying for a settlement of the estate and for the sale of the real estate, and the application of the proceeds to the payment of debts, asking, however, that her dower interest in the realty be secured to her.

In March, 1868, she filed an answer to the cross-petition of Wm. Hughes and Robinson controverting claims asserted by them against her late husband and concludes by averring that the real estate must be sold to pay debts, and that as it adjoined the town of Warsaw it would bring much more by dividing it into lots of from five to two acres and selling them off, than to sell all in one tract, and prayed the court to have the tract so divided and sold.

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On the same day that she filed her answer to said cross-petition she filed her petition in which she states that she is a daughter and an heir of the late John A. Richry, who died in 1854, intestate, in Gallatin county, before her marriage with A. G. Hughes; that she inherited from her father 35 acres of land which was set apart to her, and that in lieu of personal estate inherited from her father, she accepted fifty acres of land, making about 85 acres in all; that in 1864 her late husband sold said land to one Satchwell, but before she would agree to join him in a conveyance of said land to Satchwell, he verbally promised that he would invest the money arising from the sale of her lands in other lands and cause the title to be made to her, and in consideration of said promise and agreement she joined her said husband in a conveyance of her said land to the purchaser, Satchwell.

That when he purchased the land from Robinson near Warsaw, the same land sought to be sold, he promised to convey or caused to be conveyed to her so much of said land as the money realized from the sale of her land would pay for that, the whole amount received by her said husband for the land inherited by her from her father and personalty, amounted to about \$5,545, which her said husband promised to secure to her by investing it in land, and having the title made to her; that he purchased the land from Robinson with the design to carry out and perform his said promise but was prevented from the execution of the same by his death, and that she has not been in any way secured for the price of her land sold by her late husband as aforesaid; and she seeks by this proceeding to have as much land set apart to her as \$5,545 will pay for, or to have that sum paid to her out of the proceeds of the real estate of her late husband.

This claim of the widow was resisted by the creditors, and on final hearing was rejected by the court below, and she prosecutes an appeal.

The learned counsel for appellant has referred the court to the case of *Latimer, etc., v. Glenn, etc.*, 2 *Bush* 535, and insists with much zeal that the two cases are analogous. In that case Latimer had actually made the conveyance to his wife in his lifetime, investing her with the legal title to the land, whereas

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until that was done she had a mere equity against her husband, and besides, her husband was selling other lands in Kentucky and lands in Indiana for the purpose of paying his debts, and when she discovered that the title to the Burlington land had not been made to her she refused to relinquish her dower in the unsold lands in Kentucky and Indiana until the Burlington land was conveyed to her, which is an important fact which does not exist in this case.

It is true that the judge who delivered the opinion in the case, *supra*, does say:

"This conveyance to the use of the wife, therefore, was only the voluntary discharge by the husband of an obligation, which the chancellor would have compelled on the proper application of the wife. But that is a dictum. Whether or not the chancellor would have compelled it was not before the court and may be a question of great doubt, and indeed that sentence is qualified by one in a subsequent part of the same opinion in which it is said: 'She,' the wife, 'having the legal title with an equity untainted with illegality or fraud cannot be disturbed,' evidently giving effect to the fact that she had the legal title."

In *Maraman's Admr. v. Maraman*, 4 Met. 86, this court held that where the wife's claim is a mere equity and there is no legal demand to which she can be substituted, it would seem to follow that such a claim cannot be enforced to the prejudice of her husband's creditors. Without further elaboration we regard this case as embraced in the principle settled in the case of *Maraman's Admr. v. Maraman, supra*, and for the reason stated in that opinion this claim of the widow is not embraced in the statute providing for the settlement of insolvent decedents' estates, making all debts and liabilities of equal dignity and payable ratably.

In *Pryor, Assignee, etc., v. Dupuy*, the principle involved in this case is settled.

(This opinion seems to have been lost.)

Wherefore the judgment must be affirmed.

Landrum, for appellant.

Opinion of the Court.

JOHN GAGGIN *v.* THOMAS E. BARNES.**Bills and Notes—Want and Failure of Consideration.**

The appellee obligated himself to credit the note sued on with any funds belonging to the firm, which he had appropriated to his own use and had not charged himself with, or with which he had not been charged. The consideration was therefore a valuable one. If, at the time of the dissolution, appellant did not know that these funds had been used by appellee, he could not be presumed to have intended to release him from a responsibility he did not then know existed.

APPEAL FROM MARION CIRCUIT COURT.

April 7, 1871.

OPINION BY JUDGE PETERS:

Prior to the 21st day of May, 1868, appellant and appellee was engaged as partners in the manufacture of jeans in the town of Lebanon. On that day appellee sold to appellant all his interest, being one-third, in the factory, lot on which it is situate, the water privileges, machinery, boiler, engine, fixtures, etc., attached thereto, all the manufactured goods, dyestuffs and manufactured materials on hand, all accounts, notes and debts due to said firm except debts due and owing by appellee, whether originally created by himself or assumed by him for others, and in consideration thereof appellant stipulated to surrender to appellee a note which he then held on him for goods sold to him; also another note which appellee had executed to him for a part of the consideration for the one-third interest in said property, which he purchased from appellant and son, and on which a small balance remained unpaid, to surrender all claim to debts which appellee owed said firm or to appellant individually, to furnish him 250 yards of good jeans, to apply all debts and liabilities of the firm and to pay appellee \$5,000.00, one-half due and payable the first of January, 1869, and the residue due and payable the first of January, 1870, both installments to bear interest from the date of the dissolution and for which notes were given, and a mortgage on the property and also on a dwelling house and lot in Lebanon was executed by appellant to secure the payment of said notes; the terms of the dissolution

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are set out in a writing filed as an exhibit. The note first due not having been fully paid, appellee instituted suit in equity thereon and sought to enforce payment by a foreclosure of the mortgage; a foreclosure was resisted by appellant and he claimed in his answer that in addition to the payments endorsed as credits on the note sued on he was entitled to a further credit of \$637.38, the amount of funds belonging to the late firm which had been paid to appellee while he was a member thereof, and which with other sums paid to him he had entered on the cash book as received by him, and appropriated the amount aforesaid to his own use and had failed to charge himself therewith, all of which, he alleges, appears from the books of the firm, filed in the cause; that the misappropriation of these funds by appellee was not known to him when the contract for the dissolution was entered into, and when he discovered it afterwards he went to and told him that the books showed that the sum herein named, composed of various items he had appropriated to his own use and had improperly charged the same to the firm instead of charging himself therewith, and that he owed the firm said amount, of which he was not aware when the partnership was dissolved and consequently it was within the spirit of the contract and he never intended to release him from the payment of that debt, all of which appellee admitted, and on the third of September, 1868, executed a writing to him, which he filed as part of his answer, and by which appellee agreed that any money drawn by him on account of the factory, and not charged to him on the books, he would credit on said note as of the date of signing.

Appellee filed a reply to said answer, in which he admits the execution of the paper therein set up. States that he had credited appellant with the sum of \$234.72, made up a part of the items for which the credit is claimed by appellant, and without a sufficient denial of the appropriation of the residue of the money, he attempted to evade the effect of said writing by alleging a want and a failure of consideration therefor.

On final hearing a credit was allowed appellant for the \$234.72 admitted by appellee to be proper, and refused for the balance of the claim, and to correct that alleged error this appeal is prosecuted.

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By an agreement of the parties the original book of the firm in which the entries referred to in the answer were made is brought up to this court and is to be considered a part of the record, all of the items for which appellant claims a credit are charged to the firm on said book, although many of the entries show that the money was drawn out by appellee; and he took the deposition of appellant, who proves that the several items set forth in his answer were proper charges against appellee, and for which he was entitled to a credit on the note sued on, and he explains the circumstances under which the writing of the third of September, 1868, was executed by appellee. Whether or not from the evidence in this case independent of that writing appellant should not have been credited by a larger sum than was allowed, we need not decide, as there can be no doubt that he thereby obligated himself to credit the note sued on with any funds belonging to the firm, which he has appropriated to his own use and had not charged himself with, or with which he had not been charged. The consideration therefor was a valuable one. It seems that at the time of the dissolution appellant did not know that these funds had been used by appellee, and he could not be presumed to have intended to release him from a responsibility he did not then know existed.

The judgment was therefore erroneous and must be reversed, and the court below will, after deducting \$234.72, the sum which appellee did credit appellant with from \$637.38, the amount claimed by him, leaving \$402.66, the two-thirds of that sum being two hundred and sixty-eight and fourty-four one hundredths dollars (\$268.44) must be credited on the note sued on, as of the date of the note. In other words appellant should be credited by \$269.44 more than he was allowed in the judgment, and the judgment is on that account reversed and the cause remanded with directions to enter the credit aforesaid and for further proceedings consistent herewith.

Lindsay, Roundtree & Fogle, for appellant.

Noble, for appellee.

 Opinion of the Court.

S. K. HINTHIA v. G. H. LOVELACE'S ADMR.

Vendor and Purchaser—Deficit—Magnified Representation by Vendor—Warranty.

A magnified representation as a fact, not merely as an opinion, might, if false, entitle the vendee to relief, although the vendor may have believed what he said, for the assertion of a fact is equivalent to a warranty, if the asserter did not know the truth of what he affirmed, and it would be a fraud if he knew it to be untrue.

APPEAL FROM BALLARD CIRCUIT COURT.

January 19, 1871. .

OPINION BY JUDGE ROBERTSON:

Whether a deficit of forty-four acres of land conveyed as "supposed" to contain 184 acres should entitle the vendee to compensation may depend on circumstances extrinsic as well as intrinsic, conducing to show fraud or gross mistake.

The answer in this case, alleging such mistake, avers that the vendor represented that the boundary sold contained 184 acres.

Such magnified representation as a fact not merely as an opinion might, if false, entitle the vendee to relief although the vendor may have believed what he said, for the assertion of a fact is equivalent to a warranty if the asserter did not know the truth of what he affirmed, and would be fraud if he knew it to be untrue.

The representation as averred should be traversed, and the demurrer to the answer ought therefore to have been overruled.

Wherefore the judgment is reversed and the cause remanded for further proceedings.

White & Reeves, for appellant.

Bullock, for appellee.

D. M. GRIFFITH, ETC., v. P. B. HICKS, BY COMMONWEALTH.

Executions—Proof of Issual—Official Act of Deputy Blinds Sheriff and His Sureties.

A receipt purporting to have been given by a deputy sheriff in the absence of proof of his signature is not competent evidence as to the

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issual of an execution, because the execution itself or the execution docket is the highest evidence. Therefore, there is a failure to prove that the collection of the debt by the deputy was an official act binding on the sheriff and his sureties.

APPEAL FROM DAVIESS CIRCUIT COURT.

January 20, 1871.

OPINION BY JUDGE ROBERTSON :

There is not sufficient proof that an execution was ever issued to the sheriff of Daviess county. The receipt purporting to have been given by Warfield as deputy sheriff of Daviess county was incompetent as evidence because there was no proof of his signature, and because the execution itself or the execution docket would have been the highest evidence, and no execution having been issued and the execution docket not only failing to show the contested fact but tending to show that the only execution issued was directed to the sheriff of McLean county, there is a failure to prove that the collection of the debt by Warfield was an official act binding on the sheriff of Daviess or his sureties.

Wherefore the judgment against the sureties was unauthorized and is therefore reversed and the cause remanded for a new trial.

James, for appellants.

Sweeney, for appellee.

R. A. JOHNSON *v.* CHARLES OBET.

Municipal Corporation—Street Improvement—Lien for, How Created—Ordinance Must be in Accord With Charter.

The ordinances, resolutions and the contracts, under which a lien is created upon the abutting lots, for payment of the expense incurred in grading, paving and curbing a street, must pursue the charter of the city with strictness in order to give them legal validity.

Municipal Corporations—General Council—Journal of Proceedings—How Kept—Evidence.

The journals of a city council kept in conformity with law, like legislative journals or the order book of a court, constitute the only competent evidence of what was actually done by the council, and if properly kept are conclusive upon the subject.

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APPEAL FROM LOUISVILLE CHANCERY COURT.

May 13, 1871.

OPINION BY JUDGE LINDSAY:

The ordinances and resolutions and the contracts under which it is claimed that a lien was created upon the lots of appellants for a payment of a portion of the expense incurred in grading, paving and curbing Jacob street, can have that effect only in case the charter of the city has been pursued with that degree of strictness necessary to give to said ordinances and resolutions legal validity.

It is not enough that the same should have been passed by the general council by the requisite majorities, and approved by the mayor, but it is also essential that these facts be made to appear by that character of evidence required by the city charter.

Section 7, Article 3, of the city charter of 1851, requires each branch of the council to keep a correct journal of its proceedings, and immediately after the adjournment of each session to cause the proceedings of that session to be published. These journals kept in conformity with law, like legislative journals or the order book of a court, constitutes the only competent evidence of what was actually done by the two boards of the council, and if properly kept are conclusive upon that subject.

In this case we have as a foundation of the action, a transcript of certain ordinances, resolutions and orders purporting to have been passed and made by the general council of the city of Louisville, attested by J. M. Vaughan, clerk of board of common council. Whether he is the keeper of the official books of the city, or from what book or record this copy attest is taken, does not appear.

It seems, however, from the oral testimony of Mr. Vaughan that he is and was the clerk of the board of common council during the years 1868 and 1869. He says that when said board was in session he made memoranda of the proceedings upon slips of paper, that he afterwards copied the same upon other slips and furnished these copies to the city newspapers for publication. That he cut the published proceedings from the newspapers and pasted them in a book, and that they were

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finally copied from this book into another book which the witness called a "journal." It does not appear that the book containing the printed slips cut from the newspaper, nor the book into which they were afterwards copied were ever submitted to, inspected or approved by either of the boards of the general council.

Such books can not be regarded as journals kept by each board of said council, but rather as books kept by the clerks of said boards, containing a record not of proceedings actually had by said boards, but of the impressions made upon the minds of the two clerks.

Such records can not be received as evidence in courts of justice in cases like this when the property of the citizen sought to be subjected to the payment of a debt which he did not contract, and which he has neither ratified nor confirmed either directly or indirectly. (*City of Louisville v. McKedney*, M. S. S.)

Wherefore the judgment of the chancellor subjected to the payment of the claim sued on, the property of appellants is reversed and the cause remanded for further proceedings consistent with this opinion.

Barret & Roberts, Woolley, for appellant.

Barnett, Harrison, for appellee.

SALLY JACKSON'S HEIRS *v.* JANE DUNEAN, ETC.

Estoppel—Sale of Interest in Land—Long Acquiescence.

. Whether or not our statutes converting fee tail into fee simple made appellee's estate in the land a fee simple, she and her voluntary devisee are estopped by the sale to the mother of the appellants by her children. When covert and discover she persistently and notoriously claimed only a life estate, conceding to her children the remainder, promoted the sale of that remainder for a valuable consideration, was present when it was conveyed and neither then nor ever since until about the time of the institution of this suit, intimated a claim to the remainder.

APPEAL FROM MADISON CIRCUIT COURT.

December 17, 1870.

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OPINION BY JUDGE ROBERTSON:

Whatever may be the technical effect of the devise to Mrs. Dunean and "the heirs of her body to hold" to herself and her "heirs" it is not necessary in this case to decide.

Whether our statute converting fee tail into fee simple made her estate in the land a fee simple, we adjudge that she and her voluntary devisee are estopped by the sale to the mother of the appellants by her children. When covert and discoverd she persistently and notoriously claimed only a life estate conceding to her children the remainder, promoted the sale of that remainder for a valuable and commensurable consideration, was present when it was conveyed and neither then nor ever since until about the time of the institution of this suit for enjoining waste, a period of more than twenty years, intimated a claim to the remainder.

We may presume that she desired that her children should enjoy the remainder, whatever her title may have been, and that she was more than willing that they should, as they did anticipate the enjoyment by converting it into money which they may have needed. And, had she not, after she was ninety years old, conveyed the remainder to her grandson, her children's conveyance would probably never have been questioned or in any way disturbed by her will or otherwise. The conveyance to her co-appellee was not only voluntary but was made pendente lite, presumptively for the sole purpose of disturbing the title of appellants which might not be otherwise jeopardized.

Her age and former conduct, and the time and occasion, all indicate this. Then, shall such a contrivance defeat a title for which her children with her privity and long acquiescence, had been paid, to her advantage and greatly to their own? Not with our sanction.

Instead of dismissing the petition and dissolving the injunction the circuit court ought to have perpetuated the injunction and removed the incumbrance on the title of the appellants by cancelling the conveyance to Adams, the appellee.

Judgment reversed and cause remanded for the decree just indicated.

Burnam, for appellants.

Turner & Green, for appellees.

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A. J. GOODE'S ADMR. v. P. A. BLACKWELL.**Contracts—Part Performance—Right to Complete.**

Appellant had such an interest in the profits in the stock of goods on hand, to the amount of one-half of the net profits, if he performed his part of the contract fully by selling them out, which he had partly performed, as to entitle him to the possession for the purpose of completing his part of the contract.

Equity—Issue Out of Chancery—Weight of Verdict.

The verdict of a jury, trying an issue out of chancery is entitled to as much weight as a verdict in a common-law action.

APPEAL FROM HENDERSON CIRCUIT COURT.

April 21, 1871.

OPINION BY JUDGE PETERS:

The question whether or not Goode and Ricketts by the terms of the contract under which the business was conducted were partners as between themselves does not arise under the pleadings in this case, that relation is admitted in the two answers filed by appellee to have existed at the death of Ricketts, and by the terms of the contract Goode had such an interest in the stock on hand as authorized him to retain it until he had disposed of the whole by selling out, and then after paying the original cost, house rent, etc., the net profits should have been divided, he retaining the one-half thereof.

After appellee filed his answer in the case on his motion it was transferred to the equity docket and an issue out of chancery ordered to be tried by a jury, and that issue was as submitted by the court. "Did Blackwell purchase Goode's interest in the goods mentioned in the pleadings? If so, the price agreed to be paid."

On the trial of that issue the jury found that appellee as executor of Ricketts agreed to pay Goode the one-half of the profits on the goods after deducting costs, expenses, etc., as soon as his interest could be ascertained by taking an invoice of stock on hand, and that he should be paid dollar for dollar and not pro rata. To that finding no exceptions were taken by appellee, and was not subsequently set aside directly by the court.

A motion was subsequently made to consolidate this case with

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the case of Ricketts' executor against Ricketts' heirs and creditors, but that motion does not appear to have been disposed of, and appellant's petition was finally dismissed.

Goode certainly had an interest in the profits in the stock of groceries or goods on hand at the death of Ricketts to the amount of one-half of the net profits if he performed his part of the contract fully by selling them out; he had partly performed his agreement buying them, and he had such an interest in them as would have entitled him to retain the possession of them for the purpose of carrying out the contract with Ricketts by selling them; but it was competent for Ricketts' executor and himself to make any just and fair agreement in relation to the goods that they might deem proper; such an agreement was made according to the finding of a jury to whom the facts were submitted by consent of the parties. Their verdict was entitled to as much weight as a verdict in a common law action, as was held by this court in *Moores' Heirs v. Shepherd, etc.*, 2 Duvall 125.

But even without the verdict of the jury the evidence preponderates to the conclusion that appellee agreed with appellant as executor of his testator to pay him one-half of the profits on the goods after deducting the costs and expenses according to the invoice to be made immediately thereafter, and this agreement, it seems to us, should have been carried out, as it was within the spirit, and we incline to think the letter of the contract between Ricketts and Goode and the money to be out of the proceeds of the goods.

Wherefore the judgment is reversed and the cause remanded with directions to render judgment in favor of appellant for the one-half of the net profits on the goods on hand at the death of Ricketts according to the invoice value caused to be made by the appellee after deducting costs and expenses, and for further proceedings consistent herewith.

Turner, for appellant.

Vance, for appellee.

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GEORGE GAYLE, ETC., WM. S. ELAM.

Fraud—Defense—Pleading—Answer.

Inasmuch as the original answer failed to state that the discovery that the representations were false and fraudulent, was not made until after the execution of the note, it was not sufficient, even when tested by the principles in the case of *Pitt v. Shannon*, Hardin's Rept. 58.

APPEAL FROM HENDERSON CIRCUIT COURT.

June 8, 1871.

OPINION BY JUDGE LINDSAY:

Inasmuch as the original answer failed to state that the discovery, that the representations of Henry & Lyons & Co. were false and fraudulent was not made until after the execution of the note to Elam, said answer was not sufficient even when tested by the principles governing this court in the case of *Pitt v. Shannon* (Hardin's Rept. 58), and consequently the court did not err in sustaining the demurrer to the same.

It seems from the record that the appellants afterwards offered to file the amended answers but that the court refused to permit either of them to be filed. The clerk copies into the record two papers, which he terms "amended answers."

How said papers came into his possession does not appear, as the court did not permit the amendments to be filed, nor even lodged in the papers of the case, and as they were not made a part of the record by a bill of exceptions they in law remained in the possession of the appellants as their private property, and they could not make them a part of the record in this case by merely depositing them with the clerk without leave of court. As said papers cannot be considered a part of the record, of course we cannot determine that the court erred in refusing to permit the amendments offered to be filed.

The judgment of the circuit court must, therefore, be affirmed.

Rodman, for appellants.

Vance, for appellee.

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W. H. GRAVES v. SINGLETON GIBSON.

Evidence—Preponderance—No Legal Question Involved—Verdict Will be Upheld.

Where no legal question is involved and there is not a preponderance of evidence against the verdict, the court of appeals are not authorized to reverse the case.

APPEAL FROM SHELBY CIRCUIT COURT.

June 24, 1871.

OPINION BY JUDGE PETERS:

Appellant was the drawer, one Morton, the acceptor, and appellee was the endorser of a bill of exchange for near one thousand dollars, which was sold to the People's Bank of Louisville.

On the 18th day of December, 1867, four hundred dollars was paid on said bill, and on the 22d of December, 1869, two hundred and eighty-seven and fifty one-hundredths dollars were paid on it by appellee. After that the bank sued the parties to the bill and recovered judgment for the amount remaining unpaid. Appellee satisfied the judgment and took an assignment of it to himself. And after an official return of nulla bona brought this bill for a discovery of assets against appellant, Morton being insolvent.

Appellant by his answer raises two issues of fact. 1st. That he drew the bill for the accommodation of Morton and appellee, he having received one-half the money raised by the sale of the bill. 2d. That he paid the \$400 credited on the bill of date December 18, 1867.

Both these questions the court below decided against appellant and he has appealed. After a careful examination of the evidence we are unable to say that the court below erred in its conclusions. If the judgment is not sustained by a preponderance of the evidence, we feel assured that there is not a preponderance against it, and in such case where no legal question is involved we are not authorized to reverse. Wherefore the judgment must be affirmed.

Wheat, Middleton, for appellant.

Caldwell & Harwood, for appellee.

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WM. GARVEY'S ADMR. v. G. GARNETT.

Executors and Administrator—Demand against Estate, Arising after Death.

A demand against a decedent's estate arising after death is not embraced in the provisions of Sec. 35, Art. 2, Chap. 37, R. S., 1. Vol., p. 509.

APPEAL FROM OWEN CIRCUIT COURT.

December 13, 1871.

OPINION BY JUDGE PETERS:

Appellee had no cause of action until after he satisfied the judgment rendered on the note executed by him to appellant's intestate, and by the payment of the amount thereof a liability arose on the part of appellant to refund the amount of usury collected.

It was not, therefore, a demand against the estate of the decedent existing at the time of his death, created by him, but one that had arisen since his death and being of that character is not embraced by the provisions of Sec. 35, Art. 2, Chapt. 37, R. S., 1. Vol., p. 509.

As, therefore, no error is perceived in the judgment, the same is affirmed.

Chief Justice not sitting.

Dorman, Lindsay, for appellant.

Drane, for appellee.

ELIZA VAUGHT v. NANY SANDFORD, ETC.

Judgments—Default Judgment Against Part of Defendant.

A portion of the defendants on whom process was executed was not bound to answer until the summons was fully served, it was not error, therefore, to set aside the order taking the petition for confessed as to a part of the defendants after process had been fully served, and when they presented an answer containing a substantial defense. The order, taking the petition for confessed, was merely interlocutory.

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Actions—Action to Quiet Title—Legal Title or Possessory Right Must be Alleged.

An action to quiet the title to land cannot be maintained in the absence of the legal title or some possessory right upon which the proceedings can be based.

APPEAL FROM OWEN CIRCUIT COURT.

June 17, 1872.

OPINION BY JUDGE PETERS:

A portion of the defendants on whom process was executed was not bound to answer until the summons was fully served, it was not error, therefore, to set aside the order taking the petition for confessed as to a part of the defendants after process was fully served, and when they presented an answer containing a substantial defense they had a right to file it, as the order taking the petition for confessed was merely interlocutory. *Alexander & Lancashire v. Quigley's Admr.*, 2 Duv. 399. If this be an action to quiet appellant's title a case is neither stated in the petition, nor made out by the evidence to authorize the relief sought under the act of the legislature regulating such proceedings. Appellants neither had the legal title, nor the possessory right to the land. Nor were the pleadings drawn with the view to obtain the legal title from the person in whom it is—so that in no view to be taken of the case is there an available error in the judgment for a reversal.

Wherefore, the judgment is *affirmed*.

Ford, for appellant.

Rodman, for appellee.

A. A. TERRELL v. CHAS. J. WATHEN.

Bills and Notes—Payment in Treasury Notes—Legal Tender Act—Subsequent Judicial Decisions—Effect.

When the legal tender notes were paid in satisfaction of appellee's judgment, the opinion of the Supreme Court of the United States in

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the case of *Hepburn v. Griswald* was regarded as settling the right of creditors to demand the payment of debts, in coin, created before the passage of the legal tender act. Appellant voluntarily paid off the judgment against him in treasury notes at their negotiable value as compared with gold. The payment so made completely extinguished the relation of debtor and creditor between him and appellee. The Supreme Court afterwards overruled the case of *Hepburn v. Griswald* and held that treasury notes should be regarded as a legal tender for all debts, but this ruling cannot have the effect of reopening transactions fully and finally settled while the law was differently construed by the same court.

APPEAL FROM NELSON CIRCUIT COURT.

October 22, 1872.

OPINION BY JUDGE LINDSAY:

When the legal tender notes were paid in satisfaction of appellee's judgment, the opinion of the Supreme Court of the United States in the case of *Hepburn v. Griswald* was regarded as settling the right of creditors to demand the payment of debts created before the passage of the legal tender act, in coin.

Appellant was convinced of this fact, and voluntarily paid off the judgment against him in treasury notes at their negotiable value as compared with gold. The payment when so made completely extinguished the relation of debtor and creditor between him and appellee. Neither of them thought of claiming anything from the other. The Supreme Court, in the recent cases of *Knox v. Lee, Excr.*, and *Parker v. Davis*, overruled the case of *Hepburn v. Griswald*, and held that treasury notes should be regarded as a legal tender for all debts, but this ruling can not have the effect of reopening transactions fully and finally settled whilst the law was differently construed by the same court.

Such a rule would be productive of endless litigation and could possibly result in no good under its operations. The overruling of an opinion by the court of last resort would have the effect of unsettling every transaction based upon it, notwithstanding the existence of the utmost good faith upon the part of the contending parties.

Subsequent judicial decisions can not be allowed to set aside settlements under a construction of the law by the courts at the

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time the settlement was made. (16th Howard, 432; 9th Wallace 55 and 485.)

Judgment affirmed.

McKay, for appellee.

Muir & Wickliffe, for appellee.

IDA AND LAURA C. TUCKER, BY, ETC., v. JEFFERSON COLLEGE, ETC.

Deeds—Use, Created by—Failure—No Reverter.

If the use created by a deed of conveyance fails there will not be a reverter to the estate of the grantor.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 14, 1872.

OPINION BY JUDGE PETERS:

It is perfectly evident from the deed filed as an exhibit in this cause that the grantor, William A. Tucker, the father of appellants Ida and Laura C. Tucker, was not a donor of a charity, but the vendor of the land in fee for a full money consideration to him paid, as he recites in his deed, with a covenant of warranty against himself and all persons claiming under him.

Consequently, if there had been a use created by the deed, and it should wholly fail, there never could be a reverter of the estate to him or his heirs. *Gibson and Others v. Armstrong, etc.*, 7 B. Mon. 481.

But no use was created by the deed. The terms inserted therein, "for school purposes," express the intention of and inducement with appellee to make the purchase, and are not used for the purpose of binding them for all or any particular length of time to dedicate the estate to that purpose alone.

As appellants were asserting some claim, thought future and contingent, to the land which might impair the vendible value of the estate, appellees had a right to have the cloud removed, and no available objection is presented to the mode adopted by the chancellor to effect the object.

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This view of the case renders it unnecessary to decide the question raised by the motion to dismiss the appeal.

Judgment affirmed.

H. Pope, for appellants.

Duke & Richards, for appellees.

JOHN F. WHITFIELD v. JOHN W. BONE.

New Trial—Diligence.

The statements in the affidavits of those who were in and about the mill, if true, might have produced a different result, but there is no sufficient reason given why these persons were not examined as witnesses on the trial of the case.

APPEAL FROM HOPKINS CIRCUIT COURT.

September 28, 1872.

OPINION BY JUDGE PRYOR:

Under the contract between the appellant and the appellee by which the former agreed to saw and deliver to the appellee at the appellant's mill eight thousand feet of lumber, the appellee was not vested with any rights or title to it, until it was measured and set apart for him, as recited in the instruction given * * * by the court below. The stacking of the lumber or measuring a portion of it did not constitute a delivery until actually received by the defendant. The facts proven on the trial authorized the finding by the jury. Upon the application for a new trial the affidavits of those who sawed the lumber or who were in or about the mill the whole time the sawing was going on, are filed, and their statements, if true, might have produced a different result, but there is no sufficient reason given why these persons were not examined as witnesses. It is true the affidavits stated that the affiants had repeated conversations with the appellant and failed to disclose to him what they knew about the case, still the appellant knew they were about the mill all the time, some of them engaged in running it, and they were the very witnesses he should have examined upon the trial—the witness who lived in a distant county or town should have given

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his deposition, or the appellant made some effort to continue the case on account of his absence. The motion for a new trial was properly overruled, and the judgment of the court below is *affirmed*.

Beauchamp, for appellant.

JAMES SMITH v. MARTIN H. BROWDER.

Judgments—Entry After Term of Judge had Expired—Merger—Subsequent Act of the Legislature.

A judgment entered of record after the expiration of the judge's term of office is a nullity and the subsequent action of the Legislature can not revive a judgment that has been abandoned or merged into another.

APPEAL FROM KENTON CIRCUIT COURT.

October 1, 1872.

OPINION BY JUDGE LINDSAY:

At the time this case was appealed from the Quarterly to the Circuit Court of Kenton County, no such judgment as that of February, 1869, was in existence.

In fact, the appeal had been pending in the Circuit Court nearly a year before the Legislature enacted the statute under and by virtue of which an ex-county judge entered said judgment upon the records of a court over which he had long since ceased to preside.

It is also manifest that appellees regarded any action that may have been taken by said judge whilst in office as utterly null and void, it not having been made a matter of record, and that he abandoned all idea of enforcing the collection of a judgment that had no existence except in the recollection of an officer whose term of office had expired, hence his amended pleadings, and his judgment of March, 1870.

When the judgment was rendered, it was the only one evidenced by the record, and the only one appellee had the right to enforce. His debt, whether in the shape of an account or of

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a prior judgment, was merged into this last judgment, and from it alone could the appellant appeal. His appeal was prosecuted in proper time, and he had a right to a trial in the Circuit Court.

The subsequent action of the Legislature could not divest him of this vested right, nor could it revive against him a judgment which appellee had abandoned, and which upon his own motion had been merged into a later judgment.

The amended answer filed without objection in the Circuit Court presents a valid defense to at least a portion of appellee's claim, and the issues raised should have been tried.

The court erred in dismissing the appeal.

The judgment is *reversed* and the cause remanded for a trial upon its merits.

W. S. Rankin, for appellant.

Carlisle, for appellee.

WM. V. ULTZ v. LEROY SAMS.**Attachment—Action on Bond—Necessary Allegations.**

The petition fails to allege that the order of attachment under which appellant's property was seized had been discharged or in any way finally disposed of. No cause of action is set out.

APPEAL FROM ESTILL CIRCUIT COURT.

September 6, 1872.

OPINION BY JUDGE LINDSAY:

The petition in this case fails to allege that the order of attachment under which appellant's property was seized had been discharged or in any way finally disposed of. It follows, therefore, that no cause of action is set out. To allow a proceeding of this kind might result in a judgment in favor of appellants for damages for wrongful seizure of his property, and afterwards the justice who had jurisdiction of the same question might decide that the attachment had been rightfully sued out and the seizure properly made.

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The judgment of the Circuit Court is manifestly right and must be *affirmed*.

J. B. White, for appellant.

Riddle & Fluty, for appellee.

SOL. S. SIZEMORE v. H. S. THOMAS.

Appeals and Errors—Failure to Supersede Judgment—Involuntary Payment—Recovery at Reversal.

The appellant was not bound to supersede the judgment, and the payment thereof cannot be regarded as voluntary on his part because an execution had already issued from the quarterly court and his property had been actually seized before the dissolution of his injunction.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

October 10, 1872.

OPINION BY JUDGE LINDSAY:

The payment of the Quarterly Court judgment can not be regarded as voluntary on the part of appellee. There was a judgment against him, upon which both the Quarterly and Circuit Courts had held an execution might lawfully issue.

He was not bound, and possibly may not have been able to supersede the judgment of the Circuit Court dissolving his injunction and dismissing his petition. It was not necessary that he should, for the reason that an execution had already been issued and his property actually seized. It being apparent that appellant intended to resort to all his legal remedies to enforce the collection of the Quarterly Court judgment. Appellee's payment was made under constraint and by reason of appellant's legal advantage at the time, and as the court in effect compelled him to pay a debt he did not owe, they can not and ought not, now that they have corrected their error, refuse to assist him in recovering back the money that was improperly extorted from him by reason of such error. If such a rule was established, the right to appeal to this court would be utterly worth-

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less to those who could not supersede the judgments of inferior tribunals.

The settlement between appellee and his brother does not affect his claim against appellants.

Judgment affirmed.

Sisemore, for appellant.

Vance, for appellee.

NEELEY TRIPPLETT *v.* MARSHALL TRIPPLETT, ETC.

Vendor and Purchaser—Parol Contracts—Partition—Rescission.

The contract was nothing more than a parol agreement for the conveyance of real estate which the courts will not and cannot enforce. The oral contract under which appellees and their vendees hold should be rescinded on equitable terms.

APPEAL FROM FLEMING CIRCUIT COURT.

June 18, 1872.

OPINION BY JUDGE LINDSAY:

The pleadings and exhibits show beyond question that the appellees, or some of them, are in possession of some portion at least of the lands to which appellant holds the fee simple title. They do not hold under deeds or title bonds executed by her, nor is it pretended that they or any of them have acquired title by an adverse possession of fifteen years.

Their claim is founded upon a partition made pursuant to the written agreement of December 8th, 1860, exhibited with the answer of Marshall Tripplett. An examination of this paper shows that it was contemplated by the parties that the estate of M. Tripplett, deceased, should be divided. No reference is made directly or inferentially to the lands of this appellant. The testimony of the commissioners conduces to show that she knew that they had included her lands in the division, and that she desired that they should do so. Still, she does not seem to have given a written assent to such division. Whatever may have been her intentions at that time, she can not now be estopped from asserting her legal right by any oral agreements then made.

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The advancements to her sons, if made, were nothing more than parol contracts for the conveyance of real estate, which the courts will not and can not enforce.

Appellant's petition should not have been dismissed. She should have been adjudged possession of her lands and the oral contracts under which her sons and their vendees hold should be rescinded upon equitable terms. The action of the county court in receiving and putting to record the report of the commissioners was unauthorized and is therefore void.

The judgment is *reversed* and the cause remanded for further proceedings consistent with this opinion.

W. H. Cord, for appellant.

Andrews, for appellees.

NANNIE E. VAUGHN, ETC., v. SAMUEL TINSLEY'S ADMR.

Guardian and Ward—Failure to Properly Represent Ward in Litigation.

The appellee, who was at the time acting as guardian of the infants, might have compelled Mrs. Skelton to take her interest in the slaves in specie instead of their value, therefore, he ought not to be allowed to escape responsibility and should be required to make good the loss sustained by his wards, by reason of his failure to protect their interests.

APPEAL FROM SHELBY CIRCUIT COURT.

October 30, 1872.

OPINION BY JUDGE LINDSAY:

Samuel Tinsley sold some of the slaves devised for life to his wife, and attempted by his will to dispose of the remainder. Upon the death of his wife the title to these slaves vested in his children and grandchildren, all of whom took something from him as devisees.

One of his children, Mrs. Skelton, repudiated the legacy to her, and sued the administrator and devisees for the value of her interest in the slaves. She saw proper to make these appellants who were at the time infants co-plaintiffs with herself.

These appellants obtained nothing in that suit. Their guardian ad litem before final judgment dismissed it as to them. It

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resulted in a compromise by which Mrs. Skelton was paid by the adults \$600 in satisfaction of her claim against her father's estate. The effect of this compromise was to quiet the title of those to whom slaves were devised. These appellants, who under their great-grandfather's will were entitled as remaindermen to one-sixth of these slaves, lost their entire interest, and the money in the hands of their grandfather's administrator which ought to have been applied to the payment of their legacy of \$600 was used in the paying of Mrs. Skelton's judgment and the cost of the litigation.

If appellee who was at the time acting as their guardian had properly represented their interest, he might have compelled Mrs. Skelton to take her interest in the slaves in specie instead of their value. But he permitted her to compel her father's estate to pay for all the slaves, and then voluntarily used the money of his wards in satisfying her judgment and the costs and attorneys' fees incurred in the litigation. As the parties who took the slaves as devisees of Tinsley were directly benefited by having their title quieted by the payment of a money judgment instead of a division of the slaves, it seems to us that the parties thus benefited ought at least to contribute to the payment of this judgment and of the costs and attorneys' fees growing out of the suit. Yet it seems that the guardian of these appellants not only took no steps whatever to obtain this contribution in a suit in which all the devisees were parties, but compromised the suit by using the money of his wards for the benefit of strangers.

In such a state of case he ought not to be allowed to escape responsibility. The judgment dismissing appellant's petition is *reversed*. Upon the return of the cause appellee should be allowed to bring the devisees of the slaves before the court, and rest the question as to whether or not they are liable to contribute to these appellants, and if contribution can not be enforced by reason of the laches of appellee or the insolvency of their devisees, then he should be required to make good the loss his wards sustained by reason of his failure to protect or to even attempt to protect their interests.

A. C. Roberts, for appellants.

Harwood, for appellees.

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W. W. WATERS v. D. F. CARDIN.

Judicial Sale—Sale With Confirmation of Partition—Acquiescence of Defendant—Better Bid to the Court.

The court had directed the defendant's land sold and he was not presumed to know whether the chancellor would approve the sale or not, and this placed him in such a position that he could do nothing but endeavor to obtain as much for his land as it was reasonably worth, and a purchaser could well doubt the validity of his title obtained under a purchase where the defendant's right to the land depended upon the future action of the court in rejecting or confirming the division.

Held, that under such circumstances the chancellor should have ordered a resale, as he had a bid of 25 cents per acre in advance of the price brought at the first sale.

APPEAL FROM SPENCER CIRCUIT COURT.

October 29, 1872.

OPINION BY JUDGE PRYOR:

The authorities relied on by counsel for the appellant conduce to show that the chancellor has no power to set aside a sale, made under a judgment of his court, merely because an advanced price can be obtained for the property sold, or, in other words, for the property offered for sale. No purchase in such a case is so complete as to vest the title in the bidder until the offer is approved and accepted by the chancellor. The party making the offer or the purchase is subject to this power of the chancellor over it.

In the present case, although the owner of the land was present and encouraged the bidding in order to obtain the best probable price for the land and has signed an agreement by which he bound himself to abide the division made by the commissioner, still he was placed in such a position by reason of the judgment against him and the direction of the commissioner to sell that he could do nothing else but endeavor to obtain as much for his land as it was reasonably worth. If he had stood by and opposed the sale his action might have resulted in a ruinous sacrifice of his property. The court had directed his land sold and he was not presumed to know whether the chancellor would approve the sale or not. The conclusion seems to have been

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with him at least, that the sale would divest him of title, and this was the rational view for him to adopt. The record shows that the land of Cardin had been by a judgment of the court directed to be partitioned between his devisees, and that a judgment had been rendered subjecting the interest of the present appellee in the land, who was one of the heirs, to the payment of his debts.

The land was divided by the commissioner, not in pursuance of the order directing the division, but under an agreement between the heirs made for the purpose, as is suggested in that agreement of conforming to the wishes of all interested. Before this report of a division is made or approved by the court that part of it allotted to the appellee was sold by the commissioner and the appellant, Waters, became the purchaser. It also appears that the land sold for less than its value, and a bid was made to the court of an advance of twenty-five per cent. on the price agreed to be paid by the appellant.

What effect the sale of the land, without any confirmation whatever by the court of the division between the devisees, had on bidders does not appear, but we can well see how a purchaser could doubt the validity of his title obtained under a purchase where the devisees right to it was depending upon the future action of the court in rejecting or confirming the division, although it was made by the agreement of the parties. The chancellor acted properly in opening the biddings on appellee's motion. It does not appear that the appellant was made to pay the costs of the motion by which a resale was ordered. The employment of an attorney to resist the motion places the appellees under no obligation to pay the attorney's fee. The appellant was before the court and a party to the record by reason of his purchase and the retrial of the motion afforded him ample time to resist it and, if not, there was no sufficient reason given for a continuance of the hearing. The judgment is affirmed.

Bullock & Davis, for appellant.

C. M. Harwood, for appellee.

Opinion of the Court.

JAMES SPEED, EXR., v. LEVI TYLER'S DEVISEES, &c.

Wills—Devise of Land for Life—Remainder to Children and Their Issue—Sale for Reinvestment—Necessary Parties—Equity—Jurisdiction.

Where all persons interested, including all the great-grandchildren of the testator, in esse, are before the court, the proceeding is within the letter of the statute, and the possibility of the birth of other great-grandchildren who may take under the will does not take away from the Chancellor the power to act in the premises.

Statutes in Derogation of Power of Courts of Chancery—Construction.

Statutes in derogation of the general powers of courts of chancery ought to be so construed as not to abridge the prerogative of such courts further than their language manifests.

Judicial Sales—Reinvestment—Improvement on Part Not Sold.

The erection of improvements of a permanent nature upon the real estate not sold is a reinvestment of the proceeds of that which is sold, in other property and such improvements when made will be held for the same uses and trusts and in the same manner in all respects as the land sold.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 28, 1872.

OPINION BY JUDGE LINDSAY:

The 2d section of the act of February 16, 1858 (2d Vol., R. S., 314), provides that lands conveyed or devised to any person for life, in trust for his use, with remainder over to his children or to such of them as may survive him, or to the issue of such children, may by the judgment of a court of equity not inferior to the circuit court, be sold by the trustee, etc., * * * for the purpose of being reinvested according to the order of such court in other property in or out of this state, to be held for the same uses and trusts, and in the same manner in all respects as the property sold was held." In this case the proof is abundant that the proposed sale and reinvestment will be beneficial to all persons interested.

The only difficulties presented are, 1st, as to whether the estate devised to and held by the trustee, Speed, comes within the description set out in the statute.

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2d. Whether or not the great grandchildren of the testator, now in esse, together with all others for whose benefit the trust estate is held, constitute all persons having an interest in the property adjudged to be sold; and,

3d. Whether the improvement of that portion of the realty not sold is such a reinvestment of the proceeds arising from the proposed sale as is contemplated by the statute. Under the will of Levi Tyler, deceased, the trustee holds the estate for the benefit for life of the son and daughter-in-law and grandchildren of the testator, with remainder over to such of his great-grandchildren or their issue as may be alive at the time of the death of the surviving grandchild. We conclude that such an estate comes within the letter as well as the spirit of the legislative enactment.

All persons interested, including all the great-grandchildren of the testator *in esse*, are before the court. In this respect the proceeding is certainly within the letter of the act, and we are of the opinion that the possibility of the birth of other great-grandchildren who may take under the will does not take away from the chancellor the power to act in the premises. Statutes like the one under consideration are in derogation of the general powers of courts of chancery, and ought not to be so construed as to abridge the prerogatives of such courts, further than their language manifests that such was the intention of the law-making power. All persons now interested in the property adjudged to be sold are before the court and this is all the statute requires.

In the case of the *Falls City Real Estate and Building Association v. Vankirk, etc.*, 8th Bush 459, this court held that the act of August 23, 1862 (Myers' Supplement 426), does not authorize the sale of a portion of real estate in which there are contingent remainders, depending upon events which may or may not happen, and the reinvestment of the proceeds in improvements upon the residue, but there is an essential difference between that act and that of 1859.

Here there is no such estate as that described in the act of 1862, but as before held, just such as is contemplated by the act of 1858. The act of 1862, in terms requires the proceeds of the realty sold to be reinvested in the same kind of property to be

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conveyed, etc. The act of 1858 authorizes a reinvestment in any kind of property, with no other condition than that it be held for the same uses and trusts and in the same manner in all respects as the property sold was held.

The erection of improvements of a permanent character upon the realty not sold is certainly a reinvestment of the proceeds of that which is sold in other property, and such improvements, when made, will be held for the same uses and trusts, and in the same manner in all respects as the property sold.

Judgment affirmed.

Speed, for appellants.

Caldwell, for appellees.

FOUNTAIN F. YOUNG v. COMMONWEALTH.**Criminal Law—Homicide—Testimony of Accomplice.**

A conviction cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense and the corroboration is not sufficient if it merely shows the offense was committed and the circumstances thereof.

APPEAL FROM CASEY CIRCUIT COURT.

October 9, 1872.

OPINION BY JUDGE LINDSAY:

Section 239, Criminal Code of Practice, provides that:

"A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof."

The principal evidence against the appellant was that detailed by an accomplice. Touching the testimony of this witness the court instructed the jury that they should find the defendant guilty if they believed from the testimony of John Young, and other testimony corroborating his testimony, or circumstances tending to connect the defendant with the commission of the act

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beyond a reasonable doubt, that he did kill Tinsley, procured it to be done or was present, aiding and abetting said killing, although they may believe John Young was an accomplice in said killing.

This instruction authorized the jury to find the defendant guilty if they believed from what John Young, the accomplice, swore, and other testimony corroborating his evidence that the appellant killed or was present and aided and abetted in the killing of Tinsley, although this corroborating evidence may not have tended to connect appellants with the commission of the offense, but merely showed that the offense had in point of fact been committed.

The instruction is also objectionable because it assumed that there was testimony corroborating the statements of the accomplice, or proof of circumstances connecting appellant with the killing.

The jury should have been left to determine whether or not there was any such corroborating evidence.

It also, in effect, takes away from the jury the right to consider any other evidence than that named by the court. They are told that if they believe from the testimony of John Young, and other testimony corroborating it, or circumstances connecting appellant with the killing beyond a reasonable doubt, they must find him guilty.

Confined alone to the testimony selected as pertinent and important, they might find the prisoner guilty and still be of opinion that there was other evidence before them which, if they were allowed to consider, would at least leave a rational doubt as to his guilt.

For these reasons we regard this instruction as erroneous and misleading.

The other questions raised in the argument of counsel relate only to matters of practice, and as it is most likely that the rulings complained of will not be made upon the next trial it is not necessary that we should pass upon them. The record sufficiently shows that all the instructions given by the court are embodied in the bill of exceptions.

Judgment reversed and cause remanded for a new trial upon principles not inconsistent with this opinion.

Hill & Alcorn, A. Hensley, Breckenridge, Woolford, for appellant.

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ALFRED SHOTWELL, ETC., v. FANNIE QUIGLEY, ETC.

Will—Construction.

The intention of the testator was, that the devise over to his grandchildren in case of the death of their parents, should pass to them the exact estate devised to those they might represent.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 21, 1872.

OPINION BY JUDGE LINDSAY:

A careful consideration of the provisions of the will of Alexander Pope satisfies us that the devise over to his grandchildren in case of the death of their parents was intended to pass to them the exact estate devised to those whom they might represent.

It is conceded that the testator's children took under the will, contingent remainders in the realty involved in this litigation.

The lawful issue of such of the children of the testator as might not survive their parent were entitled to the portion the father or mother would have been entitled to if living at the death of the life tenant. The language used does not clearly define the intention of the testator but we think the most rational and reasonable conclusion to be drawn therefrom is that he intended that the issue of such of his children as might not survive their mother, should take the place of and represent their deceased parents.

Concurring as we do in the reasoning and conclusions of the chancellor his judgment must be affirmed.

St. John Boyle, for appellants.

Barnet & Roberts, E. W. C. Humphries, Bar, Goodloe & Humphry, for appellees.

W. C. WILKERSON ET AL. v. WM. C. KEAS, ADMR.**Will—Devise of Choses in Action—No Title Passes Until Will is Probated.**

Although the testator may have written a codicil to his will devising the note in question to the wife of appellant, it passes no title to it until the will is properly probated.

Opinion of the Court.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

June 28, 1872.

OPINION BY JUDGE LINDSAY:

The answer offered by appellant, W. H. Wilkerson, presented no available defense to the note sued on, and the court below properly refused to set aside the judgment and permit it to be filed.

Although the testator may have written a codicil to his will devising the note in question to the wife of appellant and making other provisions for her, such codicil can pass to her no title to the note until it is properly probated. The answer does not allege that any steps are being taken to establish in the proper court the execution of such codicil, nor is it even alleged that any such proceedings are contemplated.

For similar reasons the petition of Mrs. Wilkerson was properly rejected.

Judgment affirmed.

Holt, for appellants.

Apperson, Reid, for appellees.

H. C. WILLIS, ETC., v. A. RAINEY'S ADMR.**Partnership—Settlement Made While Both are Living Basis of Commissioner's Report.**

It is proper for the master commissioner to adopt the settlement made by the partners while both are living, as a basis of his report in settling the partnership account in a suit to settle the estate of a deceased partner.

APPEAL FROM MERCER CIRCUIT COURT.

October 26, 1872.

OPINION BY JUDGE LINDSAY:

There should have been a reply to the answer and cross-petition of Samuel Willis. The statement of facts therein set up is not identical with that pleaded by H. C. Willis. Besides, while

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appellee may have been able to state truthfully that he had neither knowledge nor information sufficient to form a belief as to the matters relied on by H. C. Willis, it is altogether probable that the testimony developed in the preparation of the case prior to the filing of the answer and cross-petition of Samuel may have compelled him to form some conclusion as to some of the facts set up in that pleading.

From the testimony presented by the record, the commissioner properly adopted the settlement made not earlier than July 12, 1862, as the basis upon which to settle the partnership accounts involved in this litigation.

It seems that all proper credits for services rendered and expenses incurred by H. C. Willis were allowed him.

It was proper to refuse to charge appellee on the partnership with any part of the \$583 paid to Nat Harris. This was the debt of the Willis brothers, and not of the partnership, and although it was contracted for partnership cattle it must be presumed that Rainey accounted for his portion of it in the settlement of July 12, 1862.

It is not so, however, as to the \$350 borrowed from Henderson. This was a firm debt, and there is nothing tending to show that in the settlement of July 12, the Willis brothers agreed to pay it.

Appellee should also have been charged with the \$52.00 he admits in his petition was paid to his intestate after he joined the Confederate army.

There is nothing to show that the \$100 paid Tylor for cattle purchased after the settlement in July was paid out of the individual funds of either of appellants.

For the reasons indicated the judgment is reversed. Appellee, upon the return of the cause, will be allowed a reasonable time to reply to Samuel Willis' answer.

Further proceedings will be had consistent with this opinion.

Kyle & Poston, appellants.

Polk, Thompson, Jr., for appellees.

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JOHN L. ZEIGLER AND WIFE *v.* GEORGE N. BROWN AND OTHERS.

Actions—Cross-Petitions—Summons on Before Judgment.

No judgment can be rendered on a cross-petition until service of summons on the defendants therein, either actually or constructively.

APPEAL FROM BOYD CIRCUIT COURT.

March 5, 1872.

OPINION BY JUDGE LINDSAY:

There was no service of process on Susan W. Zeigler upon the cross-petitions of either George N. Brown and James M. Rice, or George N. Brown and C. Cecil, assignees of Hodges, or Overton Price. Yet a general judgment subjecting Mrs. Zeigler's estate to the payment of their claims as well as that of appellee Means was rendered.

According to the provisions of Section 125, Civil Code, none of these parties were entitled to judgment on their cross-petitions until the defendants therein has been first summoned, either actually or constructively.

The judgment must be reversed as to all the plaintiffs on cross-petitions. No appeal is prosecuted from the judgment in favor of Means. It should not, however, be enforced until the claims of said plaintiffs shall have been finally disposed of, or until reasonable time has been given them to prepare their cross-actions for trial.

The cause is remanded for further proceedings consistent herewith.

Zeigler, Prichard, Ireland, for appellants.

Brown, for appellees.

W. H. H. WRIGHT *v.* ARTHUR BANKS' EX'R.

Bills and Notes—Assignment and Transfer are Synonymous Terms—Without Recourse—Presumption.

The note was not formally assigned by a written endorsement upon the back but the bond for title recites that it was transferred to appellant. The terms assignment and transfer, when applied to contracts of sale of promissory notes, are used synonymously by the

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general public and also, in some instances, by the courts. The failure to assign in writing raises the presumption that the sale was made without recourse.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

June 28, 1872.

OPINION BY JUDGE LINDSAY:

The testimony all conduces to show that the agreement between Banks and Howard was that in consideration of the payment of interest in advance, the note was not to be regarded as due until the 1st day of January, 1871. Although the recital in the bond for title held by Banks does not necessarily operate as an estoppel, it strongly corroborates the testimony of Howard as to the agreement at the time the interest on the note was paid. It follows, therefore, that appellant used legal diligence in attempting its collection.

Although it appears from the title bond filed by appellee that Wright accepted the note on Howard as part payment for the lot yet it also appears that the note was "transferred" to him. It is true it was not formally assigned by a written endorsement upon its back, but the bond for title which Banks introduces as evidence of what the contract was recites that it was "transferred" to appellants.

The terms assignment and transfer, when applied to contracts of sale of promissory notes, are used synonymously by the general public, and also in many instances the courts.

Nor is it material that the assignment was not in writing signed by the assignor. It is true that the failure to assign in writing raises the presumption that the sale was made without recourse, but this presumption is rebutted by the recitals of the title bond considered in connection with the circumstances attending the transaction.

The note was not delivered to Wright at the time of the sale of the lots. It was not due for nearly six months thereafter and when due it was worthless. We cannot conclude that appellant intended to risk the solvency of Howard, there being nothing in the record to show that he sold the lot for more than its real value.

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We are of opinion that Banks is responsible to appellant upon his contract of "transfer." Wherefore, the cause is remanded for judgment in favor of the latter and for such other proceedings as may be proper.

Apperson, for appellants.

Holt, for appellees.

JAMES M. STAMPER *v.* ISAAC INGRAM, ADMR.

Appeals and Errors—Supersedeas Bond—Signed by Administrator as an Individual.

The law does not require nor contemplate that the appellant shall sign an appeal bond and where an administrator signs as an individual he is individually liable.

APPEAL FROM MORGAN CIRCUIT COURT.

June 5, 1872.

OPINION BY JUDGE LINDSAY:.

The appellee, Isaac Ingram, is individually liable on the appeal bond in this case. He does not sign it in his character as administrator but as an individual, and he covenants that he will, as administrator, satisfy such judgment as may be rendered upon the appeal. This view of the case is supported by the fact that the law does not require nor contemplate that the appellant shall sign an appeal bond. He is required to cause the bond to be executed before the clerk, by one or more sufficient sureties, etc. Civil Code, Section 847.

The court erred in permitting Ingram to testify and for this error the judgment must be reversed.

The cause is remanded for a new trial.

Holt, Hargis, for appellant.

Hazelrigg, for appellees.

Opinion of the Court.

H. C. SMITH, ETC., v. W. J. WALKER, ETC.

Sale—Purchaser of Adulterated Whisky—Sale by Purchaser After Knowledge of Adulteration—Estoppel.

A purchaser of adulterated whisky is entitled to recover damages on his cross-petition, unless he sold the whisky after he was apprised of its being adulterated, in that event he is estopped to claim damages.

APPEAL FROM ESTILL CIRCUIT COURT.

November 21, 1872.

OPINION BY JUDGE PRYOR:

The opinion heretofore rendered in this case adjudged that if the assignees of the note on the appellant surrendered the note on Johnson in consideration of the assignment to them that the obligors in the note were estopped as against the assignees from impeaching the legality of the original consideration. Instruction No. 4, given at the instance of the appellees, Walker, etc., embraces this view of the case and was in perfect accordance with the opinion of this court. The instructions asked for by the appellants were properly refused, and if not, the instructions given by the court in lieu of the instruction asked for, presented the defense of the appellants to the jury, or the law applicable thereto, in a plain and intelligible manner. The jury were told "that if the note sued on was given for whisky that contained poisonous substance and was not of the kind contracted for, and that defendant offered to rescind the contract and return the whisky, then the defendant's right to avoid the payment of the note had not been waived or lost as against either Mize or to his assignees unless they believe as defined in instruction No. 4. This instruction, as already stated, was to th effect that if the note on Johnson was surrendered by the assignees in consideration of the assignment (the proof showing that it was assigned at the instance of both the obligor and obligees) that the facts then constituted no defense as against the assignees. The jury was further told that although no such offer was made to rescind the contract and the jury should find for Walker the amount of the note, but at the same time they

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further find that the note was given on a contract for first proof whisky, and the whisky was sold by samples of good whisky, and that the whisky delivered was not such as was sold but was drugged and adulterated, etc., then on the counterclaim and cross-petition against Mize's administrator they should find for Smith such damages as he sustained unless they believe that Smith sold said whisky after he was apprised of its being adulterated. The court below has presented the law of the case, so that the jury could not have been misled in regard to the issues made between these parties, and the evidence being conflicting and such as would authorize this court to sustain a finding for either party.

The judgment must be affirmed.

H. C. Lilly, for appellants.

John Bennett, Turner & Smith, for appellees.

ABE SANDERS, ADMR., *v.* MARIAH WADDY (OF COLOR).

Work and Labor—Implied Contracts.

The appellant for the last five or six years prior to the death of Abe Sanders, washed, cooked and labored in his household and performed all the menial services required of her.

Held, that if the services were rendered, the law implies a promise to pay therefor unless she was laboring for the deceased without any expectation of receiving compensation and with a view of compensating him for maintaining her.

APPEAL FROM SHELBY CIRCUIT COURT.

October 26, 1872.

OPINION BY JUDGE PRYOR:

Abe Sanders and Mariah Waddy, both persons of color, lived together for many years prior to the war as man and wife. The husband was a free man prior to the war and the appellee, his wife, remained a slave until its termination, when she left her former master and lived with Abe, both recognizing the existence of the relation of husband and wife until Abe's death, which occurred in the year of 1871. The evidence shows that they

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were both honest and industrious and Abe had accumulated an estate consisting of both lands and personalty, the latter valued at about fifteen hundred dollars. There never was any formal marriage between them, either prior to the freedom of both, or since. Abe carried on a blacksmith shop, cultivated a farm, having some hands engaged, all of whom boarded with him. The appellant, Mariah, for the last five or six years prior to his death, washed, cooked and labored in his household and performed all the menial services required of her and no doubt from the proof in the case, contributed to some extent, at least, in adding to the value of the estate owned by Abe at his death. The latter died without leaving any will or making any disposition of his property, leaving two children by a former wife who had been dead for several years. The two were not man and wife in a legal sense, as they had failed to comply with the requisitions of the statutes by which this conjugal relation between them would have been sanctioned by law. Mariah, after the death of Abe, instituted the present action against his administrator, asserting a claim against him, as such, for seven hundred dollars by reason of the work, labor and services performed by her for the decedent at his special instance and request. Upon an issue formed on this pleading, a judgment was rendered for Mariah, the appellee, for five hundred dollars, and from that judgment the administrator prosecutes this appeal.

The jury were told in the instruction given at the instance of appellee's counsel, that if the services were rendered as charged in the petition the law implies a promise to pay. To this instruction there can be no objection, and certainly no complaints can be made by the appellant, when, on his motion, instructions are given based upon the idea that if Mariah was laboring for the decedent without any expectation of receiving compensation, and with a view of recompensating the decedent for maintaining her, they must find for the defendant. The law was fully expounded to the jury and upon the facts proven, of which the jury were the sole judges, the verdict was rendered. There is testimony upon the part of the defense conducing to show declarations made by each of the parties, that the one was not claiming any interest in the property of the other and that the appellee occasionally worked from home and collected the price paid for

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her labor. Such conflict in the testimony will not authorize this court to disturb the verdict, but on the contrary the facts appearing upon the record present a meritorious cause of action considered either by a court or jury. The numerous authorities relied on by the learned counsel for the appellant cannot be made applicable to a case like this. If the relation of husband and wife existed between Abe and Mariah she would be entitled, as his widow, to an interest in his estate, and as it is conceded that it does not exist, and such being the law, this supposed relation cannot be relied on as a bar to appellee's recovery in this action. The judgment of the court below is affirmed.

Weakley, appellant.

Harwood, for appellee.

MERRILL SMITH *v.* D. F. SMITH.**Signatures—Expert Testimony.**

The conclusions of expert witnesses are entitled to very little weight where they do not agree, either in their test or reasoning.

APPEAL FROM GARRARD CIRCUIT COURT.

January 4, 1872.

OPINION BY JUDGE LINDSAY:

The proof conducing to show that the signatures to the disputed papers are genuine is neither convincing nor satisfactory. Those who profess to be acquainted with the handwriting of appellant are by no means positive in their opinions that the disputed signatures are genuine.

The conclusions of the experts are entitled to very little consideration. They do not agree either, in their tests or reasoning. A personal inspection of all the papers, those conceded to be genuine, and those disputed, satisfies us, either that appellant's genuine signature made at different times differed so much that it could not be said to be characteristic, or else that the same person did not sign all the papers before us. Besides this the circumstances of the case incline us to doubt very greatly whether appellant owed to appellee any debts other than those

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secured by the mortgage. No reason is given why the \$900, paid October 23, 1865, was credited on the debts secured by the mortgage instead of being applied to the payment of those which were not secured, if in point of fact such debts were claimed to exist when Poore was endeavoring to induce appellee to advance the money necessary to enable appellant to pay the judgment in favor of Wilds. Upon the contrary, appellee conceded his indebtedness to appellant and induced Poore to renew his note to Wilds upon the idea that he would finally advance the necessary amount to pay the same in part satisfaction of the devise of his father to appellant.

Upon the whole case we are not inclined to think that the testimony preponderates in favor of the genuineness of the signatures to the disputed papers, and are of opinion that the injunction should have been dissolved except as to the balance due on the debts secured by the mortgage.

The judgment is reversed and the cause remanded for further proceedings consistent herewith.

McKee, Dunlap, for appellant.

Owsley & Burdett, for appellee.

SARAH WINSOTT, ETC., v. GEORGE A. BRICKEN'S EX'R.

Boundaries—Lost Corners—Ascertainment and Establishment—Stakes as Corners—Natural Objects—Location—Question for Jury—Courses and Distances.

The boundary of the land described in the petition calls for a stake as indicating nearly every corner and the location of the corner is a question solely for the jury to determine. Stakes may be corner to surveys as well as stones.

When the degrees or courses in a deed differ from the natural or artificial object designating the boundary the course must yield.

A lost corner is located by running the courses and distances from a known corner.

Exceptions, Bill of—When to Prepare.

A bill of exception should be prepared and filed at the term of the court at which the judgment is rendered, if at all practicable.

APPEAL FROM MARION CIRCUIT COURT.

October 18, 1872.

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OPINION BY JUDGE PRYOR:

There is much conflicting testimony as to the location of the boundary line between the lands owned by the parties to this action and particularly as to the corner claimed by appellee and known as the stone at letter J on the survey, made part of this record. All the deeds offered as evidence by each party call for stakes at the corners of the surveys made except at one or two points. The boundary of the land described in the petition and which appellees allege includes the land in controversy, calls for a stake as indicating nearly every corner. Where this corner in dispute is located, whether at the letter J on the plat or in the center of the old state road or at some other point, is a question solely for the jury to determine. We are unable to perceive, however, why stakes may not be corners as well as stones, and particularly when the deeds call for them as such. The jury were very properly told in instruction No. 4, given at the instance of appellee's counsel, that where the degrees or courses in a deed differ from the natural or artificial objects designating the boundary that the courses, etc., must yield, but in instruction No. 7, asked for by same counsel, the jury are told what is meant by natural or artificial objects and are expressly instructed that neither includes a stake—that is, if stakes were planted as corners and so proven they are not to be regarded as such, or, if gone, the place at which they were planted cannot be shown by proof. One of the witnesses in the present case speaks of a stake called for at a gate post as a recognized corner now, the place where this stake stood or any other object known as a corner may be shown by testimony for the purpose of fixing the corner or determining the true line of the survey. This was doubtless the object appellant's counsel had in view in attempting to locate a corner at this particular point. One mode of ascertaining a lost corner is by running course and distances from a known corner. There is proof conducing to show that the old state road was located in a different place from where it was said to run by appellee's witnesses. If this be true, the jury might say that the corners or the stakes marked as corners had been removed. The effect of instruction No. 7 is to refuse to permit the jury in considering the questions involved to

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determine from the evidence that stakes instead of stone were the corners of the land in controversy, as well as the recognized corners of the various boundaries to the tracts of land the calls and courses of which affect the boundary in question. This instruction withdrew from the jury the proof of the appellants, and in effect decides the case for the appellee. It is unnecessary to decide whether this court would have considered the instructions A, B and C, asked for by appellant, or not. This practice, if permitted by the court below and sanctioned by this court, might result in great injury to litigants and shows the necessity, where it is at all practicable, of requiring counsel to prepare and present their bills of exception at the same term the judgment is rendered. For the reasons indicated the judgment of the court below is reversed and cause remanded with directions to award to the appellants a new trial and for further proceedings consistent with this opinion.

Harrison, for appellant.

Roundtree & Fogle, for appellee.

N. B. WILSON v. JOHN B. DAVIES.**Principal and Surety—Indulgence—Release of Surety.**

If the creditor and principal debtor make a contract, founded on a valuable consideration and such a one as can be enforced, for indulgence without the assent of the surety it will operate as a release of the surety.

APPEAL FROM JEFFERSON CIRCUIT COURT.

November 1, 1872.

OPINION BY JUDGE PETERS:

Although the note was executed to Wilson, as payee, it is conceded that Whitman was the beneficiary and real creditor.

The doctrine is well established that if the creditor and principal debtor make a contract founded on a valuable consideration, and such a one as can be enforced for indulgence without the assent of the surety, it will operate as a release of the surety. *Kenningham, etc., v. Bedford, etc.*, 1 B. M. 325; *Duncan v. Reed, etc.*, 8 B. M. 382.

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In this case Shirley proves that after the note matured he made a contract with Whitman to continue to employ him in his hotel at a salary of \$1,000 per annum in consideration that he would give indulgence on the note, and such employment was continued several months after the note matured and in fulfillment of said agreement, Whitman caused Wilson to desist from collecting the note; that fully one-third of the one thousand dollars was paid for the indulgence, as his services were not worth more than two-thirds of that amount and that Davies, who was his surety on the note, was ignorant of the arrangement, and of course never assented to it. As to the exceptions to some of the answers of Shirley to interrogatories propounded by appellee, we need only say that in answer to the 6th interrogatory he states in direct terms that Whitman agreed in consideration of his retaining him in his, Shirley's, employ at a salary of \$1,000 per annum, he would defer the collection of the note, and in consideration of that agreement he caused Wilson, who had possession of the note, to desist from applying for its payment for several months. And the answer to the next question where he uses the terms "it was understood," etc., is evidently the witness's mode of expressing the time the contract was to continue, having in the previous answer stated the contract, and the court below committed no error in overruling appellant's exceptions.

Wherefore, perceiving no error in the judgment, the same is affirmed.

R. H. Field, for appellant.

JOHN W. SANDERS *v.* J. C. LAWSON, ETC.

Attachment—Garnishment Purchase Money—Title Must be Perfected Before Payment Can be Enforced.

The pleadings show that appellant's indebtedness to Innes was for a tract of land for title to which he held the bond of the latter. By this bond Innes covenanted to make appellant a general warranty deed to the land. The appellant, who occupies the position of garnishee, should be allowed to avail himself of every defense he could have made had suit been brought against him by Innes. The court, in its judgment, does not attempt to invest appellant with the title to the land for which he is adjudged to pay.

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APPEAL FROM HARDIN CIRCUIT COURT.

October, 1872.

OPINION BY JUDGE LINDSAY:

Lawson and Pusey should have brought original actions against Innes instead of making themselves parties to the suit of *Garnett's Administrator v. Garnett's Heirs, etc.*, but no objection was taken to the mode of proceeding in the court below, and this court will not reverse for that cause alone. We are aware of but two sections of our civil code, 248 and 274, authorizing judgments directly against persons indebted to parties who subject themselves to be proceeded against by attachment. The petitions of both appellees set out grounds of attachment against Innes, their debtor, and Sanders, who occupies the position of garnishee, cannot complain that orders of attachment were not sued out, nor the necessary bonds for the protection of Innes executed.

But he ought to have been allowed to avail himself of every defense he could have made had suit been brought against him by his creditor Innes, and of this right he has been deprived.

The pleadings show that his indebtedness to Innes is for a tract of land for title to which he holds the bond of the latter. By this bond Innes covenanted to make to Sanders a general warranty deed to the land. This has not been done, nor does the court, by its judgment, attempt to invest Sanders with the title. It merely adjudges that Innes' title is good, valid and legal and then compels Sanders to pay the purchase price and leaves him to his remedy against Innes to enforce a conveyance of title. In this the court erred. If Innes could not be gotten into court by actual service of process the proper steps should have been taken upon the constructive service to have authorized a judgment investing Sanders with the title, he has the right under his bond to demand. Further than this the petitions of appellants show that the holder of the legal title to the land is Gibbon and not Innes at all. The judgment must be reversed. Upon the return of the cause appellees should be allowed a reasonable time within which to so prepare the case as to authorize a judgment investing Sanders with title, in which

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event they may have judgment against him for the amount of their debts against Innes.

Brown, Murray, for appellant.

Montgomery, for appellees.

ROBERT TODD'S ADMR. *v.* R. SOUTHGATE'S EX'R.

Evidence—Competency—Interest of Witness—Credibility.

As a general rule a witness must have a direct and certain interest in the result of the suit to render him incompetent. If he is neither to gain nor lose by the result and the verdict cannot be used as evidence in his favor he is competent; a contingent or doubtful interest goes only to his credibility.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 24, 1872.

OPINION BY JUDGE PETERS:

The writing sued on, bearing date the 1st day of October, 1856, purports to have been executed by James O. Hinde, Thomas H. Hinde and Robert Todd to Richard Southgate for three hundred and fifty dollars, due sixty days from date, with interest at the rate of ten per cent. per annum from date.

The suit was brought on the 14th of January, 1871, by the executors of the payee of the note against the personal representatives of Todd alone.

The answer in three separate paragraphs presents three defenses to bar the action. 1st. That Todd was only the surety of his co-obligor, James O. Hinde, and that more than seven years having elapsed after the maturity of the note before any action was brought against him or his personal representatives, the same was barred. 2d. That Southgate, in his lifetime, had agreed with Hinde, the principal, without the consent or knowledge of Todd to extend the time of payment of said note after its maturity, and did actually postpone the time of payment for a valuable consideration, whereby he, Todd, as surety, was discharged from any legal obligation to pay the debt.

And 3d. Payment of the debt.

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This last paragraph of the answer was, however, discontinued.

To sustain their defense the appellants took the deposition of James O. Hinde, to which appellees excepted, their exceptions were sustained, and the deposition suppressed, and appellants offering no other evidence, judgment was rendered against them for the amount claimed and they have appealed.

From the foregoing statement it is obvious that the only question of importance involved in the appeal is whether the court below erred in suppressing the deposition of Hinde which certainly conduced to sustain the defense.

In *Todd v. Luckett*, 18 B. Mon. 125, this court said, as a general rule, a witness must have a direct and certain interest in the result of the suit to render him incompetent. If he is neither to gain nor lose by the result, and the verdict cannot be used as evidence in his favor, he is competent; a contingent, doubtful interest goes only to his credibility.

In this case James O. Hinde was not even a party to the record, and certainly was not interested in the issue in behalf of himself. The verdict and judgment rendered in the case could not have been used as evidence in his favor and whether appellants succeeded or not, his liability could not be dismissed, for if they succeeded he would still be bound for the debt to Southgate's representatives, and if they failed and had the debt to pay he would be responsible to them for the amount; so that in any event his interest was equipoised.

Craig, etc., v. Hudson's Admr., M. S. S. opinion; at the present term.

The court below, therefore, erred in sustaining the exception to and excluding the deposition of Hinde. Wherefore, the judgment is reversed, and the cause is remanded for a new trial and for further proceedings herewith.

Webster, for appellants.

Hallam & Hallam, for appellee.

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A. S. TRIMBLE, ADMR., *v.* E. A. HENSLEY.

Pleadings—Imperfect Petition—Commissioner's Report Will Not Help.

A commissioner's report will not be allowed to help an imperfect and defective petition. A judgment must be based as well upon the petition as the proof, and testimony which tends to establish some fact not alleged in the petition is irrelevant and incompetent.

APPEAL FROM MORGAN CIRCUIT COURT.

September 7, 1872.

OPINION BY JUDGE LINDSAY :

Appellee's petition sets out the fact that he placed in the hands of the intestate a large number of claims for collection, but fails to discriminate as to which he received as sheriff, which as constable, and which as town marshal. He alleges that large sums of money were collected on these claims and considerable amounts paid over to him, but he fails to fix the aggregate of either.

He also claims that the intestate laid himself liable for many claims but fails to state what claims or in what manner the liabilities were incurred.

The petition utterly fails to set out any amount for which judgment should be rendered or to furnish any data by which such amount could be ascertained by the court. It is nowhere alleged that appellant is ignorant of the particulars of his pretended cause of action nor that a discovery from the appellee is either necessary or desirable.

Such a paper as that, styled the petition, is in no sense a pleading, and if it had remained unanswered, or if the appellee had come into court and confessed that everything it contained was true, no judgment could have been rendered upon it.

The commissioner's report cannot be allowed to help this imperfect and defective petition. The judgment must be based as well upon the petition as the proof, and testimony which tends to establish some fact not alleged in the petition is irrelevant and incompetent. Neither the amended petitions nor the answers cure the defects pointed out. It follows therefore that the judgment as to the matters and things touching intestate's

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official action, either as sheriff, constable or marshal, must be reversed.

The plea of the statute of limitation as to the merchant's accounts sued on should have been sustained. More than six years had elapsed after the date of the last charge on either of the accounts before the action was instituted.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

Rodman, for appellant.

Hazelnigg, for appellee.

SHELBYVILLE & BELLEVIEW T. P. CO. v. BEN WASHBURN, ETC.

Attachments—Garnishee—Personal Judgment—Rule to Show Cause—Final Judgment—Receiver.

The appellees took a rule against appellant to show cause why it had not made payment into court of the sum admitted to be due as garnishee. Appellant responded that it did not have the money, thereupon the court made an order placing the company in the hands of a receiver, which was a final order.

Held, that as the appellant was only a garnishee, it was error to render a personal judgment against it or place its property in the hands of a receiver.

APPEAL FROM SHELBY CIRCUIT COURT.

November 8, 1872.

OPINION BY JUDGE LINDSAY:

This appeal is prosecuted by a garnishee. The appellants, a turnpike corporation, answered, admitting an indebtedness to the defendant, McCarty, of five hundred dollars. Whereupon the circuit court ordered that it should pay into court said sum of money within thirty days and upon failure to do so, that the several appellees might have executions against it for the amount of their judgments against McCarty. The company failed to pay as required, and appellees instead of issuing executions applied for and had a rule issued against appellant requiring it to show cause why it had not made the payment into court of the sum admitted to be due to McCarty.

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In response the company, through its treasurer, states that the order had not been obeyed because it has not had the money necessary to make the payment; that it then had no money and that there was no prospect that the receipts of the company would enable it to make the required payment.

Upon the filing of this response and without further pleading the court made an order appointing a receiver, and directing him to take charge of the company, to collect the tolls accruing on its road, and report his acts to the court.

This order is certainly final. It settles the right of appellees to apply to the payment of their judgments against McCarty all the tolls arising from the travel on appellant's road, and takes from the company until these judgments are satisfied the right to control and manage its own property. That it is erroneous, it seems to us, is perfectly clear. The garnishee was not made a defendant to any of the actions against McCarty except to that of Ramsey and brother-in-law merely a defendant in form as to that case. No judgment was asked against it, as might have been, had the proceedings conformed to section 248 of the Civil Code.

Appellant was proceeded against under section 246 of the Code, and when the remedies therein provided were exhausted the power of the court ended. It might have been attached for contempt in failing to pay the amount owing to McCarty into court, or to secure its payment by the execution of the proper bond, but no personal judgment could be rendered against it, nor could its franchises and road be seized. *Griswald v. Popham*, 1st Duvall 170; *Smith v. Grower*, 3d Metcalf 171.

As the judgment appealed from was unauthorized it must be reversed. The cause is remanded for further proper proceedings.

Harwood, for appellants.

Lindsay, for appellee.

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SAMUEL C. SAYERS v. ELISHA W. COLEMAN, ETC.

Husband and Wife—Conveyance by Wife to Husband or to Themselves is Void—Two Parties are Necessary to a Deed.

A wife cannot convey to her husband, because she cannot, on account of her disability of coverture, make a deed unless her husband joins her in its execution. She and her husband cannot, in conjunction, make a deed to the latter, nor to themselves, because two parties are necessary to every deed and the same person cannot occupy the attitude of grantor and grantee, donor and donee.

APPEAL FROM KENTON CHANCERY COURT.

September 12, 1872.

OPINION BY JUDGE PETERS:

Appellant, who was the husband of Mrs. Harriett Sayers, deceased, claims a life estate in 136 acres of land in Kenton county, and two lots near the city of Covington which Mrs. Sayers held in fee under a deed bearing date 6th of December, 1868, by which he and his wife attempts to convey a life estate in said lands to themselves and to the survivor of them, remainder to the brothers and sisters of Mrs. Sayers of the whole blood.

Mrs. Sayers having died this suit was brought by a portion of her heirs against the others for partition or sale of the real estate left by her, and appellant being in possession was made defendant. He filed an answer and claimed under said deed, and a demurrer having been sustained to his answer, he has appealed to this court.

It is a well settled principle that a wife cannot convey to her husband, because she cannot on account of her disability of coverture make a deed unless her husband join her in its execution. She and her husband cannot in conjunction make a deed to the latter, nor to themselves, because two parties are necessary to every deed. And the same persons cannot occupy the attitude of bargainor and bargainee, donor and donee.

Second. It is a maxim of the common law that the husband and wife cannot make a valid contract with each other during the coverture, the true reason for which is that the wife is regarded as under the coercion of the husband, whereby she is deprived of the freedom of volition, and should not be bound by her con-

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tracts with him. *Scarborough v. Watkins and Wife*, 9 B. Mon. 540.

The demurrer was therefore properly sustained to Sayers' answer, and as the other defendants in the court below do not complain of the judgment of that court, the same is affirmed on the appeal of S. C. Sayers.

J. M. Collins, Carlisle, for appellant.

Stevenson, Myers, for appellant.

W. H. WALKER *v.* JOHN M. BROWN, ETC.

New Trial—Failure to Attend Original Trial—Inexcusable Negligence.

No reason is offered why the answer was not sworn to when it was written. If appellant had read the summons he would have learned in what month the court would sit, but he was so inattentive to the business that he entirely forgot it. The want of diligence is so palpable and culpable on the part of appellant in failing to prepare his defense, according to his own statement, as to wholly preclude him from the relief sought.

APPEAL FROM FRANKLIN CIRCUIT COURT.

June 12, 1872.

OPINION BY JUDGE PETERS:

This suit was brought to obtain a new trial in an action ordinarily brought in the court below by appellee against appellant, for a sum of money alleged by the former to be due him by the latter, and in which action judgment was rendered by default.

Appellant alleges in his petition that he had a good and valid defense to said action, but was prevented from making the same by unavoidable accident and which he could not have prevented.

Which preventing accident, or casualty he describes as follows, that he then resided in Owen county, where he still resides; that he was in the county of Franklin on business when the summons was served on him, which he forthwith took to his attorney, J. L. Scott, and employed him to prepare his defense; that his said attorney on the same day drew his answer, setting forth

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fully the facts constituting his defense to the action, but as the Franklin Circuit Court was not then in session, his attorney advised him he could file his answer when the cause was called for trial, and that he could verify his answer when he came to Frankfort to attend the defense of the action. With this information he left the office of his attorney fully intending to be present at the trial of the case, verify his answer, and make his defense, but as he was not well advised as to the time "for holding this summer term of the Franklin Circuit Court," he entirely forgot the time at which the law fixed said term, and at the time the case was set for trial he was in the city of New York purchasing a stock of goods and he did not advise his attorney of his trip to New York as he verily believed that the first term of the court after the services of the summons on him, and to which he was required to answer would commence in October, 1871.

The first question in the case to be considered is, if all that is stated in the petition be admitted to be true, is it not manifest that appellant was guilty of inexcusable negligence? No reason is offered why the answer was not sworn to when it was written, and if appellant had been enough interested in the business to have read the copy of the summons delivered to him, he would have learned from it in what month the Franklin Circuit Court would sit. But he does not say he did not know when the court did sit—he, in fact, did know it, but was so unattentive to the business that he entirely forgot it; gave it no further attention; got no subpoena for witnesses, although he lived in a different county, nor does he say that he made the slightest preparation from the day he had his answer drawn until after judgment was rendered against him, even if the answer has been sworn to, or if his attorney had verified it, which from anything that appears in the case, he might have done under section 611, Civil Code. Still not witnesses appear to have been

Wherefore the judgment is affirmed.
summoned. nor any preparation made for the trial.

The want of diligence is so palpable and culpable on the part of appellant in failing to prepare the action in ordinary against

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him according to his own statements as to wholly preclude him from the relief sought.

Ford & Scott, for appellant.

Brown & Julian, for appellee.

JAMES STEGAR'S ADMR. v. JORDON PERKINS.

New Trials—Newly Discovered Evidence—Diligence—Witness to Fact in Issue.

It is not shown that any effort was made to discover the evidence before the trial of the original action, nor is the evidence discovered of that certain and unerring character that would, on a second trial, inevitably produce a different result and the chancellor will never interfere with a judgment at law, unless the evidence discovered would be such as to change the verdict.

APPEAL FROM GARRARD CIRCUIT COURT.

June 21, 1872.

OPINION BY JUDGE PETERS:

The evidence alleged to have been discovered since the trial at law applies directly to the question in issue on that trial, and it does not appear that appellant used reasonable diligence in his efforts to procure the evidence which he professes recently to have discovered. The witness whose evidence he now professes to have discovered is a brother of Jacob Froman, who, it is alleged, was the debtor of appellee, resided in the same county where the alleged debt was created and it is not shown that any effort was made to discover or to procure the evidence before the trial of the original action.

Nor is the evidence discovered of that certain and unerring character that would on a second trial inevitably produce a different result; and the chancellor will never interfere with a judgment at law unless the evidence discovered would be such as to change the verdict. *Daniel v. Daniel*, 2 J. J. Mar. 52. In this case, it is said, we know of no case in which a new trial has been granted or sanctioned by this court on the isolated ground

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of discovery of witnesses to a fact involved in the issue at law and tried.

Wherefore the judgment is **affirmed**.

Owsley & Brudett, for appellants.

Dunlap, for appellee.

JESSE SEARS v. J. M. BRYANT, ETC.

Patents—Fraudulent Procurement—Collateral Attack.

Even fraud, which vitiates the most solemn proceedings, such as judgments or patents, cannot be relied upon or proved to impeach either collaterally, but same can only be vitiated or annulled by a direct proceeding, affording as high a grade of evidence as that of their creation.

APPEAL FROM PULASKI CIRCUIT COURT.

June 25, 1872.

OPINION BY JUDGE PETERS:

It has been repeatedly decided by this court that if a patent appear perfect on its face, it cannot be vitiated or annulled by matters dehors the record, except by scire facias, or some other regular mode of proceeding instituted for the purpose of vitiating it.

And even fraud, which vitiates the most solemn proceedings, such as judgments or patents, cannot be relied upon or proved to impeach either collaterally, but the same can only be vitiated or annulled by a direct proceeding affording as high a grade of evidence as that of their creation.

The judgment must therefore be affirmed.

VanWinkle, for appellant.

ALBERTUS WILLIAMS, BY, ETC., v. CLEVELAND PORTWOOD.

Infants—Contracts—Necessaries.

In order to enforce the contract of an infant it must be shown that the property purchased was necessary for his support, and

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where the whole fortune of the infant is less than \$1,000.00, the annual profits of which would not be sufficient to maintain him in the most economical style, a horse is not a necessity.

APPEAL FROM MADISON CIRCUIT COURT.

1872.

OPINION BY JUDGE PETERS:

It is conceded that at the time appellee executed the note he was under 21 years of age. That being the case, in order to enforce the contract it was necessary to show that the horse, for the price of which the note was given, comes under the denomination of necessities.

This appellant has failed to do. The whole fortune of the young man was less than \$1,000, the annual profits of which would not be sufficient to support him in the most economical style, and to be comfortable it was necessary that he should have engaged in some business or labor, or he must necessarily use a part of his principal. It does not appear that he was engaged in any permanent or regular pursuit, and under the circumstances we are not prepared to say that the horse was a necessity. Judgment affirmed.

Burnam, for appellants.

Chenault, for appellee.

MARCELLA DANIEL ET AL. v. N. S. WHEELER'S EX'R.

Evidence—Proof of Declaration Not Addressed to Witness.

The mere declaration of a party made on but the one occasion, in a conversation not addressed to either of the witnesses who, years after are called upon to prove them, made in the hearing of no others, and in the treasuring up of which they could have no interest, they being strangers to the speaker, is at most but weak and unsatisfactory evidence.

October 5, 1872.

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OPINION BY JUDGE PETERS:

The evidence relied upon to establish Mrs. Daniels' claim to the one thousand dollars involved in this litigation consists in the declarations of the testator proved by three witnesses made on one occasion in their presence in the bar room of appellant, H. C. Daniel, the credit of one of whom is directly attacked, and to say the least of it, is greatly weakened by the witnesses examined as to his character. But even if there were no facts or circumstances derogating from the character of either of the witnesses, the mere declarations of a party made on but the one occasion, in a conversation not addressed to either of the witnesses, who years after are called on to prove them, in the hearing of no others, and in the treasuring up of which they could have no interest, they being strangers to the speaker, is at most but weak and unsatisfactory evidence for reasons that have been too often written by judges to bear repetition here.

In support of the claim appellee presents the note of H. C. and L. P. Daniel, reciting on its face that it is for loaned money, and stipulating in the most formal manner for the payment of the interest, semi-annually, at a higher rate than was then allowed by law, and to secure the payment of the money a mortgage on the same day is required to be executed with legal solemnity by said appellants in which they recite it was executed to secure the payment of \$1,000 that day borrowed from said testator.

In addition Ballard proves that on the day the note and mortgage bears date, H. C. Daniel came to his office in Shelbyville with N. S. Wheeler, introduced him to Mr. Wheeler, told him he was his father-in-law, that he and his father, P. Daniel, were about to borrow some money from him to make some improvements on the property owned by them in Shelbyville, to fix it up to carry on a hotel, and directed him to write a mortgage on their property to secure the debt, and he wrote the mortgage and note executed by them to Wheeler. And Mrs. Emma Chappell proves that H. C. Daniel and his wife told her, in the summer of 1868, that the testator had loaned them the money.

This evidence is more than sufficient to overcome the evidence of the three witnesses who undertake to prove the admissions,

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or declarations of the testator made on one occasion only in their presence, some three years before they were called to testify, in a conversation not addressed to them, and in which they had no particular interest.

The judgment of the court below must therefore be affirmed.

Bullock & Davis, Roberts, for appellants.

Z. Wheat, for appellees.

THE COMMONWEALTH OF KY., FOR THE USE OF R. D. KEMPER, *v.*
W. H. MOORE, JR., ETC.

Action on Writing—Petition Must Set Forth Writing.

The petition on its face shall contain a statement of the facts constituting a cause of action and the writing, which is the foundation of the action, is required to be filed with the petition, but that does not obviate the necessity of setting forth in the petition so much of the writing as will show by reason of the alleged acts, or omission on the part of the defendant, that the plaintiff is entitled to relief.

APPEAL FROM OWEN CIRCUIT COURT.

September 9, 1872.

OPINION BY JUDGE PETERS:

Tested by the law of pleading as ruled by this court the petition in this case is clearly defective in failing to state either in terms or in substance the writings or bond for a breach of which the action was brought.

It is not sufficient to state that at a particular election appellee was elected marshal of Owenton and on a named day executed a covenant, or bond, in the Owen County Court as required by law, which bond is referred to and filed as a part of the petition, and that afterwards an order for an attachment was placed in his hands in the suit of Davis against Schwartz and that he levied said attachment on the goods or property of appellant of a certain value and that by reason of said levy and the taking said goods they were wasted, destroyed and lost to appellant.

The rule as prescribed by the code of practice required that the petition on its face shall contain a statement of the facts

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constituting a cause of action. And although in another section of the code the writing, which is the foundation of the action, is required to be filed with the petition. But that does not obviate the necessity of setting forth in the petition so much of the writing as will show by reason of the alleged acts or omissions on the part of the defendant that the plaintiff is entitled to relief.

Hill, for the use of *Wintersmith v. Barrett, etc.*, 14 B. M. 67; 6 Bush 533; *Murphy v. Estes*.

It results from the foregoing principles and authorities that the petition was insufficient and the demurrer was properly sustained and the judgment must be affirmed.

Lillard, for appellant.

Drane, for appellees.

EWING & PATTERSON V. I. C. WINFREY, ETC.**Contract, To Refrain From Selling Liquor—Public Policy.**

A contract to refrain from selling liquor by retail for one year is not against public policy.

APPEAL FROM ADAIR CIRCUIT COURT.

October 18, 1872.

OPINION BY JUDGE PETERS:

In an exchange of hotel property appellee covenanted with appellants that he would not keep a hotel nor permit any one else to do so in the house he that day got of appellants and which was recently occupied by them as a hotel. This covenant was signed by appellee on the 18th of January, 1868.

In the petition it is substantially charged that afterwards, viz.: in July, 1868, appellee contracted with appellants through Barbee and Triplett, their agents, for that purpose, to pay them \$125 or to pay them \$25 and to Barbee and Triplett, the lessees of their bar, \$100, if they would release him from his covenant or obligation not to keep a hotel in said house, and to agree that he might do so and permit him to get a license to retail spirituous liquors there by the drink; that in consideration of said promise to pay

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said sums, they did release him, and he procured a license from the county court and the town authorities to keep a hotel and to retail liquor by the small, and kept the hotel and retailed liquor, and they claimed the same which they allege appellee undertook and promised to pay.

The allegations of the petition in relation to the contract to pay the \$125 to be released from the obligation not to keep a hotel in the house described were controverted by the answer; but the execution of the writing filed with the petition and the allegation that he procured the licenses but denies that he kept hotel and sold liquor by the small in the house he got of appellants or that he permitted others to do so.

After the evidence was heard the court gave peremptory instruction to the jury to find for the defendant, and appellant's motion for a new trial having been overruled they have appealed to this court.

The evidence of Epperson shows that prior to the expiration of the term for which appellee covenanted he would not keep the hotel in the house aforesaid, he did keep hotel there and sell liquor by the drink, and that he told him he had to pay to that house, pointing to the house of appellant's, one hundred dollars, and this evidence is corroborated by that of Barbee.

We do not perceive how the contract was against public policy. It would seem that the restriction to prevent him from keeping hotel to sell liquor by the drink would be pro bona publico. There is no evidence before the court as to the size of Columbia; but the court may assume that the bar of appellants and of Epperson might have been sufficient to supply the public necessities for liquor in that locality without making it a penal offense in appellants to bind appellee to abstain from selling liquor there for one year only.

The evidence, to say the least of it, tended to prove that there was such contract as appellants alleged, and the court below erred in peremptorily instructing the jury to find as in case of a nonsuit.

Wherefore the judgment is reversed and the cause remanded with directions to allow a new trial and for further proceedings conformable hereto.

Russell, Fogle, for appellants.

Winfrey & Winfrey, for appellees.

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COMMONWEALTH v. WM. SHERITT.

Ball—Forfeiture—Order Showing Indictment Dismissed Entered Nunc pro Tunc—Evidence by Parol.

In a proceeding upon the forfeiture of a bail bond, it may be shown, by parol evidence, if agreed to, that the defendant surrendered himself into the custody of the court at the next term after the forfeiture was entered and that the indictment was dismissed and the prisoner discharged, which order was not entered of record at the time, and such order may be entered nunc pro tunc.

APPEAL FROM BOYD CIRCUIT COURT.

June 10, 1872.

OPINION BY JUDGE PETERS:

A judgment was rendered against appellee in the court below as the surety of Frank Sheritt in a bail bond for \$300 for his non-appearance. At a subsequent term, the court below set aside that judgment and entered a judgment of remission. From this last judgment the commonwealth appealed to this court, and said judgment was reversed, because the record did not show that Frank Sheritt, the principal in the bond, had surrendered himself or was otherwise in the custody of the court as required by section 94 of Criminal Code, without which the court was not authorized to render a judgment of remission, and remanded the cause with directions for a judgment to be entered consistent with said opinion.

The opinion and mandate of this court having been filed in the court below, at its June term 1870, the cause redocketed on motion of the attorney for the commonwealth, and at the following October term of said court judgment was rendered against appellee for \$300, the penalty in the bond in conformity to the opinion of this court. On a subsequent day of that term of the court, that judgment was set aside for reasons stated in the affidavits of William Sheritt and others.

At the June term, 1871, the cause was continued, and at the next October term the record shows that Frank Sheritt appeared in open court, and thereupon appellee, by his attorney, moved the court to enter an order nunc pro tunc to the effect that at the June term, 1869 (being the next term after the forfeiture of

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the recognizance), Frank Sheritt came voluntarily into court and surrendered himself in the custody of the court in answer to the judgment against him, and to enter further on the record that he then voluntarily surrendered himself into the custody of the court.

By consent, the case was then submitted to the court upon said motions, and on final hearing, with the further agreement that the affidavits of Rowland Barns and J. C. Easthan should be taken and read as evidence, and the evidence in the former bill of exceptions be read also, and the order dismissing the indictment against Frank Sheritt and the order discharging him. And the court thereupon adjudged that said Frank Sheritt did, at the next term after the forfeiture of the recognizance, come voluntarily into court and surrender himself in custody in answer to the charge against him, of which, however, no order was made by the court at the time, and that the failure to make the order was probably owing to the fact that the indictment against Frank Sheritt was dismissed and he was discharged. That the affidavits admitted as evidence showed that said Sheritt did voluntarily come into court to answer the indictment and there is no evidence in conflict therewith, or that he was brought in by compulsory process, and the court thereupon enters now, for then, that at the June term, 1869, Frank Sheritt came voluntarily into court and surrendered himself in custody, and upon the whole case adjudged further, that William Sheritt, the surety in the bail bond, was not wholly free from blame, but on consideration of the whole case, remits the forfeiture except as to the sum of thirty dollars and the costs, and thereupon adjudged that the Commonwealth of Kentucky recover against William Sheritt the sum of thirty dollars and the costs of the proceeding to enforce the forfeiture. And the attorney for the commonwealth excepts to the order, nunc pro tunc, and to the judgment so far as it remits any part, and prayed an appeal.

The foregoing is a history of the case with a copy of the judgment rendered on the last trial.

It must be conceded that if the record of the case, when it was first here, had contained orders of the court showing that before a judgment of forfeiture had been rendered, the accused had voluntarily surrendered himself in custody, and that after-

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wards the indictment against him was dismissed, the judgment of remitter would not have been reversed by this court.

After the return of the cause the motion of the appellee to show these facts by evidence was not excepted to nor resisted, and although he offered to prove their existence by parol, that evidence was not only not objected to but the attorney for the commonwealth consented that the parol evidence should be heard, so that there was no question before the court below, nor is there any now before this court as to the competency of the evidence by which the facts were established, nor as to the time when it was offered. The attorney for the commonwealth did except to the ruling of the court permitting the orders to be made *nunc pro tunc* and to the final judgment.

But whether the orders were then made or not, we apprehend, was immaterial, because the only reason for entering them was that they should be evidence of the facts and as the evidence of the same facts was by agreement of the attorney for the commonwealth before the court, appellant was not prejudiced by the ruling of the court in permitting them to be entered.

The admitted evidence therefore authorized the judgment. The defendant in the indictment appeared in court to answer the charge against him and it was dismissed and he discharged, from which it appears that the demands of the law were satisfied, the court having the power after the surrender of the accused to remit the forfeiture, and no sufficient or available reasons are adduced to set aside the judgment of the court below.

Wherefore the same is affirmed.

THOMAS CROSS v. JAMES S. CLARKSON, ETC.

Deeds—Acknowledgment—Certificate of—County Judge's Seal.

The certificate of the acknowledgment of the deed does not show that the judge himself affixed to it the seal of his court, nor that he caused it to be done by the clerk thereof. The clerk verifies his own certificate by his official seal and not by the seal of the county court. The two seals may be one and the same, but it is necessary under the law that it shall in some way affirmatively appear that the certificate of the judge is made under the seal of his court.

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APPEAL FROM KENTON CIRCUIT COURT.

September 16, 1872.

OPINION BY JUDGE LINDSAY:

Appellant insists that as judges are not usually the custodians of the seals of their courts it is sufficient under the provisions of the 17th section of chapter 24, Revised Statutes, for them to cause such seals to be affixed to their certificates by the officers having them in legal custody.

The certificate of the acknowledgment by Mrs. Clarkson of the deed to Rich does not show that the judge himself affixed to it the seal of his court, nor that he caused it to be done by the clerk thereof, and the clerk verifies his own certificate by his official seal and not by the seal of the county court. The two seals may be one and the same, but it is necessary under the law that it shall in some way affirmatively appear that the certificate of the judge is made under the seal of his court. From the certificate of the clerk it does not even appear that he is the clerk of the court over which the judge presides nor, indeed, of any court, considering everything appearing upon the conveyance, it cannot be adjudged that the certificate of the judge of the county court is in any way verified by the seal of his court.

The defect in the attestation of the instrument is a substantial one, and authorized the chancellor to hold that the attempted conveyance did not divest the mother of the appellants of her title to the real estate therein described.

Judgment affirmed.

Benton, R. D. Handy, for appellant.

JOSEPH WILSON AND OTHERS *v.* R. G. STONER AND OTHERS.

Attachment—Grounds for.

The attachments followed the violation of the many promises upon the part of appellants to the appellees to pay their debts, long before the suits were instituted, and when they must have had the money in their pockets to discharge the greater portion of them. The effort upon the part of Wilson to have suits brought against him, upon paper on which the members of his wife's family were

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endorsers and his desire to make a secret sale of his land, although without the desire to prefer a creditor, when connected with the other facts and circumstances proven, establish beyond a doubt a fraudulent intention on the part of appellants in the sale and disposition of their property.

APPEAL FROM BOURBON CIRCUIT COURT.

October, 1872.

OPINION BY JUDGE PRYOR:

Joseph Wilson, one of the appellants in this case, was engaged for many years in the county of Bourbon in buying and selling mules and cattle in the northern and southern markets. His credit in the community where he lived and where the transactions involved in this controversy took place, was unlimited until a few months prior to the institution of these various suits against him. His honesty and integrity, both as a man and trader, seem never to have been questioned until his failure to comply with the contracts he had made with the present appellees and others destroyed the confidence in him, resulting not only in the institution of the suits referred to, but also in obtaining attachments therein which were levied on his property and that of his two sons, who were liable with him, either one or the other, and perhaps both, upon nearly all the notes filed with the consolidated actions. The appellees relied upon many of the grounds enumerated in section 221 for the issual of this renewed attachment, but after a careful examination of the facts presented in the record, we deem it necessary only to allude to the statements contained in the various affidavits "that they had sold and were about to sell their property with the fraudulent intent to cheat, hinder and delay their creditors." It may be as insisted by counsel, that the sixth ground for an attachment in the section of the Code already referred to, can only be adopted in causes where the renewal was the necessary and natural effect of preventing creditors from collecting their debts, and it does seem to us that any other construction would work not only a hardship upon the debtor, but would be greatly prejudicial to the trading and commercial interests of the state. The proof in this cause conduces to show that the appellants, Joseph Wilson and his sons, were continually impressing upon the minds of the cred-

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itors of the former, viz., the father, their entire ability to discharge all of their indebtedness and to fulfill all the contracts that the father had made or was about to make with these appellees for their stock. A studied effort was made by Joseph Wilson to induce all those with whom he was about trading, or when the trade had been consummated to believe that he was in a condition not only to meet his liabilities, but to command from the banking institutions in the vicinity of which they levied, all the means necessary to sustain him in his large speculations. These appliances inspired his creditors and neighbors with renewed confidence in him, and his ability to meet his liabilities and comply fully with all his contracts. At the time these creditors were being deluded, Wilson was largely indebted to several of the banks and to individuals greatly in excess of the value of his estate, and was striving, no doubt, to command means by which he could redeem paper upon which he had obtained money with the names of parties upon it who were not only ignorant of their liability upon the paper but failed to recognize their own signature. The facts proven indicate, however, that the names of the parties had long previous been placed upon the bills to enable Wilson to raise money for other purposes than that to which it was applied. If the appellant, instead of betraying the confidence that had so long been imposed in him by the appellees, had disclosed to them his pecuniary condition when he purchased their stock, then they would have no cause to complain, and while this action on his part could only create a suspicion as to his motives, still his failure after he had purchased the stock to pay for them out of the proceeds, as he had promised, or to account for the manner in which he disposed of the money, evidences an intention to place the stock or its proceeds beyond the reach of creditors. While his application of these monies to other debts would not have constituted fraud, still his failure to show that he has thus applied the money, or to account for it in any other way, goes far to establish a fraudulent intention on his part, both in the purchase and sale of the stock. According to his own statement and including the ten thousand dollars that he had sent his son to pay these debts, he still had nine or ten thousand dollars unaccounted for. It is true that the counsel insist that he paid nine thousand dollars of the money to a national bank at Wash-

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ington City but of this there is no proof. In this estimate is also included a loss on the cattle of thirteen thousand dollars, when the preponderance of the proof tends to show that his loss did not exceed four thousand dollars, leaving in his hands unaccounted for nearly twenty thousand dollars, and even conceded that thus far he was not guilty of any fraudulent conduct but a mere violation of his promise to pay. After he had sent ten thousand dollars of the cattle money to his son to apply to the payment of these debts, and the truth of which the appellants are disposed to question. The sons, no doubt, with the consent of the father, and, if not, it is immaterial, invested this ten thousand dollars in mules, carried them to a southern market where they were sold by the father, or the son, and still not one dollar paid or the proceeds of the sales accounted for, and the only reason assigned for not paying these creditors is that the father had no interest whatever in them. The mules in the possession of Todd Wilson, and numbering near 100 and claimed by him as his own property, are also so sold, and the proof establishes the fact that they were not his but belonged to Mrs. Lewis. These mules, they, the appellants, claimed to own time and again, and witness after witness details conversation with H. F. Wilson in which he claimed to own the lot of mules when in fact they had no interest whatever in them except, perhaps, in the profits to be made upon the purchase. The claim of ownership was doubtless asserted for the purpose of inducing these creditors and those with whom contracts were made, of the ability of these parties to meet all their obligations and to enable Joseph Wilson to obtain credit. The sale and conveyance of the land to Mrs. Wilson and Mrs. Lewis, while the consideration seems to have been paid by them, evidences an intention on the part of the appellants to so dispose of their property as to enable them to pocket the proceeds regardless of the rights of creditors. We are inclined to the opinion that the repeated statements said to have been made by Joseph Wilson, that he had ample means or as much as twenty thousand dollars with which to pay his debts are true, and while the witnesses who testify on this subject are creditors of the appellants, still their testimony is strongly fortified by all the proof in the case, and the entire failure upon his part to show what he has done with the money. The attachments levied upon the property

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of the defendants was calculated to create some bitter feeling on the part of Joseph Wilson towards his creditors and, as he insists, destroyed his credit, that being the only capital he had to enable him to pay his debts. While this may be true, these attachments followed the violation of the many promises upon his part to these appellees to pay their debt long before the suits were instituted, and when he must have had the money in his pocket to discharge the greater portion of that indebtedness. The efforts on the part of Wilson to have suits brought against him upon paper on which the members of his wife's family were endorsers, and his desire to make a secret sale of his land, although without the design to prefer a creditor, when connected with the other facts and circumstances proven in this cause, establishes beyond a doubt a fraudulent intention on part of appellants, Joseph Wilson and H. T. Wilson, in the sale and disposition of their property.

At the time these causes were consolidated a consent order was entered by which the parties were to have the same right to give evidence as witnesses in behalf of each other as if the causes had not been consolidated. We, therefore, see no reason why these parties were not competent witnesses for each other, although they afterwards filed joint pleadings.

The facts in the record conduce to show that the appellant, or two of them, at least, Todd and Andrew Wilson, are men of families and housekeepers, but it also appears that their homesteads are upon the lands owned and claimed by their wives; that they are residing upon the lands adjudged to belong to their wives and not subject to the attachment levied upon them. This clearly appears as to Todd Wilson and it is to be inferred that the same state of facts exist as to Andrew Wilson in the absence of any assertion by him of his rights to the exemption, and when his wife owns a part of a tract of land sought to be made liable by these appellees for their debt. Andrew Wilson is not on this note, nor is his estate made liable therefor. It is only made liable for the debts for the payment of which his property has been attached. The property of Joseph Wilson is first subjected to the payment of the judgment upon which his sons are liable as sureties and then the property of Todd Wilson. Either of the sureties are liable for the whole of this debt and the failure of the court below to apportion these liabilities between them is no cause for reversal as against the appellees.

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Wherefore the judgment of the court below for the reasons herein indicated is affirmed. Samuel Owings does not appear as appellant in this record. Judge Peters did not sit in this case.

Prall, Kinkead, Buckner, for appellants.

T. Turner, Hanson, Houston & Mulligan, R. T. Davis, for appellees.

JOSEPH WILSON AND OTHERS v. R. G. STONER ET AL.**Homestead—Right of Exemption.**

The right of exemption depends upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family, and does not exist where the residence of the debtor is permanently located elsewhere.

Homestead—Actual Residence of Husband on Wife's Land—Right of Exemption Must be Asserted.

If the actual residence of the husband is on the wife's land, he cannot assert any claim to exemptions in land owned by him adjoining or elsewhere. Nor is the court compelled in every judgment rendered to reserve the right of homestead in the land, when no such right is asserted.

Homestead—Who May Claim and How Asserted.

The debtor or his family may assert their right to a homestead during the pendency of the suit, if in equity, or they may oppose the confirmation of any sale by which they are attempted to be deprived of this right and the possession of the property in which they have a homestead.

APPEAL FROM BOURBON CIRCUIT COURT.

November 23, 1872.

OPINION BY JUDGE PRYOR:

This court, in the case of *Brown Bros. & Co. v. Martin, etc.*, reported in 4 Bush, page 47, adjudged that Lee was not entitled to a homestead in the land sold, for the reason that he did not occupy the property or intend to make it his actual place of residence. The real estate sold in that case was all that appellant Lee owned, but the fact of his keeping house in a different part of the city, and not claiming his actual residence

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as on the property sold, concluded him from the benefits of the homestead law. The case supposed by counsel in the petition for rehearing—when the wife owned property in Lexington and the husband (living with her) owned property, real estate, in the country—then is the husband, owning no other real estate, entitled to the beneficial provisions of the law. The case in 4th Bush settles the question.

“The right of exemption depends upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family, and does not exist where the residence of the debtor is permanently located elsewhere.”

If the actual residence of the husband is on the wife's land, he cannot assert any claim to exemption in land owned by him adjoining, or elsewhere. Nor is the court compelled in every judgment rendered to reserve the right of this homestead in the land, when no such right is asserted, for the reason that the question is not litigated, and the court is not presumed to know whether the benefits of the act should be applied or not. Nor is it necessary for the debtor to assert this right, unless it forms the subject-matter of the controversy. What title does the purchaser obtain under an execution sale where the homestead is included and sold without the consent of the debtor and his family? None.

The debtor or his family may assert this right during the pendency of the suit to subject the property, if in equity, or they may oppose the confirmation of any sale by which they are attempted to be divested of this right and possession, or in other words it is not the subject of sale unless under a judgment where the right to the benefits of the act itself is determined. In regard to the judgment, we must confess that we have been unable to see in what way Andrew Wilson's property is made liable for the Hamilton debt owing by Joseph and Todd Wilson alone.

The judgment directs the sale of the property of Joseph Wilson to pay the debts, and then so much of the property of H. T. Wilson as has been attached as will satisfy the plaintiff, and will then sell so much of the property, real and personal, of the defendant Andrew Wilson attached herein, as will satisfy the

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debt of the plaintiffs whose attachments were levied on his property not paid and satisfied by the property of Joseph and H. T. Wilson. This judgment does not subject the property of Andrew Wilson to the payment of any debt for which he is not liable. The Hamilton attachment was not levied on his property, and the sheriff is directed only to sell the attached property to satisfy the debts of plaintiffs whose attachments have been levied on Andrew Wilson's property.

We have examined this case again carefully and find no judgment against Andrew Wilson for any debt for which his name does not appear. The opinion rendered fails to make special reference to the debts for which Andrew Wilson is made liable, and is so modified as to show that there is no judgment or attachment against him for the Hamilton debt.

Petition is overruled.

Kinkead & Buckner, for appellants.

 FELIX CASTEEL v. ISAAC FAUBUSH.

Execution, Sale Under—Sale of Equity of Redemption—Conveyance to Prior Purchaser—Action to Set Aside—Allegations of Petition Not Sufficient.

It is not alleged by appellees that they at any time paid or offered to pay the prior purchaser his money and interest which he bid for the land, nor did they tender the money to him when they instituted this suit. The amount paid by him was small, but he had a right to it or the land, and appellees having failed to avail themselves of the right secured to them by the statute, the chancellor cannot relieve them.

APPEAL FROM LAUREL CIRCUIT COURT.

October 4, 1872.

OPINION BY JUDGE PETERS:

In March, 1854, appellee recovered a judgment in a justice's court against James Casteel for \$45.21. After several unsuccessful efforts to collect their debt by executions directed to constables of Laurel county, the same county in which the judgment was rendered, appellee filed a copy thereof in the office

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of the clerk of the circuit court for said county, had it there recorded, and sued out an execution directed to the sheriff of the county on the 28th of November, 1861, which he levied on a tract of land on which the defendant in the execution resided.

In March, 1862, a vendition exponas issued, under which the sheriff made sale of the land on the 10th of May, 1862, when John Links became the purchaser at the price of five dollars, much less than two-thirds of its appraised value, and executed bond with surety for said amount payable to the plaintiffs in the execution. On the 7th of November, 1862, another execution issued on said judgment directed to the sheriff of said county, which he levied on the defendant's equity of redemption in the same land, and on the 10th of January, 1863, sold the equity of redemption which appellee, F. J. Faubush, purchased at the price of \$73.55, the full amount of debt, interest and costs due on said execution. And on the 12th of March, 1866, W. P. Evans, the sheriff, who made the sale when Links purchased conveyed the land to R. Wilson by authority of a written order from Links to him, as he recites in his deed, Links having transferred the benefit of his purchase to said Wilson.

Three days after the date of said conveyance this suit in equity was brought by Isaac J. and Henry Faubush against James Casteel, Felix Casteel, R. Wilson and John Links, alleging in their petition that believing Links purchased the land for them, they paid no further attention to it, and they expected that said Casteel would pay the debt, interest and costs and redeem the land; but that James Casteel and Links had combined together to defraud them and that the former had paid \$—— to induce him to write the order to the sheriff to convey the land to Wilson, and that Wilson, who is the son-in-law of James Casteel, thus more effectually to carry out the fraud combined with and made a pretended sale of said land to Felix Casteel, the son, and that all of said transfers were made without consideration and to defeat them in the collection of their debt. And they pray that the sheriff's deed to Wilson and his sale to F. Casteel be set aside, or if that cannot be done then they pray that they be adjudged to have a prior lien on the land, and that it be subjected to sale to pay their debt.

The allegations of fraud are fully controverted in the answers

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of the defendants, and no evidence offered other than copies of the judgment, executions, officers returns thereon, the valuation made by the appraisers and the deed of the sheriff of Laurel county to Wilson.

On final hearing the court below adjudged that appellees had a lien on the land and ordered a sale thereof, or so much as would bring the amount of their debt, interest and costs, including the cost of this suit, and this appeal is prosecuted to reverse that judgment.

It is not alleged in the original and amended petition by appellees that they at any time paid or offered to pay the prior purchaser, Links, his money and interest which he bid for the land, nor did they tender the money to him when they instituted this suit. It is true they do allege that Wilson purchased Links' interest for James Casteel, but it is denied in the answers of the defendants, and there is no evidence of any such arrangement and when the deed was made to Wilson the time for redemption had expired. The amount paid by Links was small, but he had a right to it, or to the land, and if appellees failed to avail them of the right secured to them by Sec. 6, Art. 12, Chap. 36, R. S., 1. Vol., page 484, the chancellor cannot relieve them upon the facts as presented in this case.

Wherefore the judgment is reversed and the cause is remanded with directions to dismiss the petition.

J. G. Carter, for appellant.

W. A. CARPENTER AND WIFE v. GEORGE CARPENTER.

Husband and Wife—Wife's Separate Estate Conveyed to Her by Husband May be Mortgaged With His Consent.

The residue of the land not paid for with the proceeds of the wife's land having been paid for by her husband and having procured that residue to be conveyed to her separate use, he must be regarded and is in fact her donor, and having joined his wife in the mortgage, he as donor has thereby consented to the same.

APPEAL FROM CASEY CIRCUIT COURT.

June 24, 1872.

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OPINION BY JUDGE PETERS:

Sec. 17, Art. 4, Chapter 47, R. S., p. 28, prohibits the alienation of the separate estate, personal or real, of a married woman with or without the consent of any husband she may have, but she can alienate it by the consent of the donor or his personal representative, where it is a gift. And the same section prohibits the sale of the separate estate of a married woman thereafter created, except by a court of equity, for exchange or reinvestment, etc.

The amendment to that act, of 13th of February, 1866, Myers' Supp. 728, merely provides that the section, *supra*, shall not be construed to forbid the alienation of separate estates of married women, whether created before or since the adoption of the Revised Statutes under an express power in the will, or deed, creating such estate by the consent of the husband.

By an act approved January 16, 1868, Vol. Sess. Acts, 1867-8, p. 5, it is provided that when real property has been or shall hereafter be conveyed or devised to a married woman for her separate use without the intervention of a trustee and without any restriction upon the sale or conveyance thereof during coverture, the right of such married woman to sell and convey said property, shall be the same as if said property had been conveyed or devised to her absolutely without any separate use being expressed; but her separate use shall continue in the proceeds of such sale.

This last amendment enables a married woman, so far as the alienation of her separate estate is concerned, to do so where there is no trustee intervening, just as she could alienate her general estate. But said act impresses the proceeds of such alienations with the character of separate estate, and when the aid of the chancellor is invoked to make disposition of the proceeds, he must look into the transaction, ascertain from what source they derived, and if he finds them to be the proceeds of a married woman's separate estate, he will see that they are not diverted to a different purpose.

That the land claimed to have been mortgaged by appellants to appellee was conveyed to Mrs. Nancy E. Carpenter as her separate estate is not seriously controverted, indeed the fact is recited in the note filed by appellee as the evidence of his debt,

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and it is not denied, that a greater part of the purchase money paid for the land was derived from the sale of lands inherited by Mrs. N. E. Carpenter from her father under the judgment of the court, for the purpose of reinvesting the proceeds, and the chancellor having thus acquired control of the proceeds of her lands, might lawfully exercise a discretion whether the land purchased with them should be conveyed to her as separate or general estate, and especially might he order the estate to be conveyed to her separate use by the consent of herself and husband when there were no creditors or heirs to complain.

To the extent, therefore, of the investment of the proceeds of the lands inherited by Mrs. Carpenter from her father in the land mortgaged to appellee after the same was conveyed to her separate use, she could make no alienation whereby to destroy the separate use which attaches to it. The mortgage, therefore, so far as it was intended to charge as much of the land conveyed to her separate use as the proceeds of her land paid for, to secure the debt owing to appellee, is inoperative.

But it appears in evidence that the lands purchased by the husband are more valuable than those of his wife sold under said judgment, and that the husband borrowed the money to pay the difference in the value on his own credit and gave his own note with surety for the debt, and, subsequently appellee advanced the money to W. A. Carpenter's creditor. The note and mortgage sued on were executed to secure the payment of the money thus advanced by appellee.

Thus it appears that the residue of the land not paid for with the proceeds of the land of Mrs. Carpenter was paid for by her husband, and having procured that residue to be conveyed to her separate use he must be regarded and is, in fact, her donor, and having joined his wife in the mortgage, he, as donor, has thereby consented to the same, as by the 17th section of art. 4, chap. 47, R. S., *supra*, she was capable of alienating her separate estate given to her by her husband with his consent. We do not doubt that under a proper state of pleading the land, except the proportion that the money arising from the sale of the land inherited by Mrs. Carpenter from her father paid for, may, under the mortgage, be subjected to sale, or so much thereof as will be sufficient to pay the debt. But as the judgment subjected the

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whole land, the same is reversed and the cause is remanded for further proceedings consistent herewith.

VanWinkle, for appellants.

Jacob & Durham, Fogle, for appellee.

SOPHIA CHAMBERS, ETC., v. WOOL GROWERS BANK OF
NEWARK, OHIO.

Mortgage—Foreclosure—Assignment of Note—Necessary Parties.

Although the appellee as the assignee of the two notes is beneficial owner of the mortgage executed to secure their payment, it is not vested with the legal title thereto. The benefit of the mortgage passed as an incident, when the notes were assigned, but the legal title remained in the mortgagee, and he was a necessary party to an action for its foreclosure.

APPEAL FROM SCOTT CIRCUIT COURT.

June 8, 1872.

OPINION BY JUDGE LINDSAY:

Although the appellee, as the assignee of the two notes executed by the Chambers, is the beneficial owner of the mortgage executed to secure their payment, it is not vested with the legal title thereto. The benefit of the mortgage passed as an incident when the notes were assigned, but the legal title remained in J. B. McLain, the mortgagee, and he was a necessary party to an action for its foreclosure.

The failure to make him a party was a defect appearing upon the face of the petition. This ground of objection was specified in appellant's demurrer which should have been sustained.

Therefor the judgment appealed from, in so far as it forecloses the mortgage in question, is reversed. The judgment is personal and is not to be affected by this reversal. The cause is remanded for further proper proceedings.

Polk, for appellants.

Prewitt, for appellee.

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COMMONWEALTH v. JOHN M. PHIPPS.

Grand Jury—Qualification—Civil Officer—Processioner Disqualified.

A processioner of land is a civil officer and is therefore disqualified to sit on a grand jury.

APPEAL FROM MAGOFFIN CIRCUIT COURT.

June 4, 1872.

OPINION BY JUDGE LINDSAY:

One of the reasons for which an indictment may be set aside is a substantial error in the summoning or formation of the grand jury. Criminal Code, Section 159.

Section 1, Article 1, Chapter 55, Revised Statutes, provides that a civil officer shall not be competent to serve upon a grand jury.

A processioner of lands is a civil officer. R. S., Chapter 60, Section 2.

As one of the grand jurors finding the indictment in this case was a processioner of lands, the court did not err in setting said indictment aside.

Judgment affirmed.

Attorney-General, for appellant.

WESLY P. CUNDIFF v. WM. B. CUNDIFF.**Bills and Notes—Warranty of Horse—Damages—Set-Off.**

The facts set up in the answer amounts to a warranty that the stallion was capable of performing services which render horses of that kind valuable. Damages for a breach of this warranty could be lawfully set off against the note sued on, even in the hands of the assignee.

APPEAL FROM BULLITT CIRCUIT COURT.

October 29, 1872.

OPINION BY JUDGE LINDSAY:

Appellee, by his answer, relied for defense to the note and for rescission of contract upon the deceit alleged to have been practiced upon him by the original payee.

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The facts set up amount to a warranty that the stallion was capable of performing services which renders horses of that kind valuable. Damages from a breach of this warranty could be lawfully set-off against the note sued on, even in the hands of the assignee.

The law and facts seem to have been submitted to the court. His judgment upon the facts is entitled to same consideration as the verdict of a jury.

We cannot say that his finding is against the weight of the evidence. His judgment must therefore be affirmed.

R. H. Field, for appellant.

A. H. Field, R. J. Meglor, for appellee.

COMMONWEALTH v. PHILIP COOPER.

Intoxicating Liquors—Sale to Minor—Forfeiture of License—Indictment—Jurisdiction.

It is not charged in the indictment that the appellee was a vendor of spirituous liquors and unless he had such a license, the fine is only fifty dollars, which does not give the Court of Appeals jurisdiction. Every fact necessary to give jurisdiction should be stated and as that is not done in this case the court cannot assume that appellee had a license to sell liquor and on conviction might forfeit same.

APPEAL FROM WASHINGTON CIRCUIT COURT.

June 5, 1872.

OPINION BY JUDGE PETERS:

By an act of the legislature approved March 22, 1871, it is provided that if any person shall sell, give, loan, or procure for or furnish to a person under twenty-one years of age, any spirituous, vinous or malt liquors or any mixture of either without the written consent of the father of such person, if living, or of the mother, or guardian, if the father be dead, he shall be fined upon conviction in any court having jurisdiction thereof fifty dollars for each offense, and costs to include an attorney's fee of \$20, if the commonwealth is represented on the trial by the attorney for the commonwealth or the county, or by an attorney appointed by

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the court to prosecute when neither the commonwealth's nor county attorney is present. And by the 3d section of said act it is provided that if any licensed vendor of such liquors be convicted of the offense in addition to the fine above named, he shall forfeit his license, etc. Vol. 1, Sess. Acts 1871, p. 85.

It is not charged in the indictment that the appellee was a licensed vendor of spirituous liquors and unless he had such license the fine is only fifty dollars and this court would have no jurisdiction. Every fact necessary to give jurisdiction should be stated, and as that is not done in this case, this court cannot assume that appellee had a license to sell liquor, and on conviction might forfeit the same. Wherefore the appeal is dismissed for the want of jurisdiction.

Attorney-General, for appellant.

Hays & Cunningham, for appellee.

EPHRAIM DRAKE v. ELIZABETH THOMAS ET AL.

Trust—Action Against Trustee—Venue.

The appellant might, by a rule in the Woodford Circuit Court, have been forced to settle his accounts as trustee, being an appointee of that court—still the venue was not local to that court and appellees might bring their suit in the county where the summons could be served on appellant.

APPEAL FROM JESSAMINE CIRCUIT COURT.

June 11, 1872.

OPINION BY JUDGE PETERS:

By the terms of the deed to Price, the trustee, we have no doubt that Mrs. Thomas and her children took a joint and equal interest.

By the sale of the land under the judgment of the Woodford Circuit Court the character of the estate was changed and was converted into personalty. By the death of Simon Thomas the reasons for the trust ceased and which appellant might, by a rule in the Woodford Circuit Court, have been forced to settle his accounts as trustee, being the appointee of that court. Still,

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the venue was not local to that court, and appellees might bring their suit in the county where the summons could be served on appellant.

It cannot be regarded as a hardship upon him to require him to settle his accounts, especially as he seems never to have given any surety for the funds in his hands. Nor does the amount adjudged against him appear to be more than he justly owes—even admitting his defense to the suit is properly before the court.

We do not perceive that any injustice was done, or that the judgment is prejudicial to appellant. Wherefore the same is affirmed.

Huston, for appellant.

Anderson, for appellees.

B. H. SETTLES *v.* W. D. COTTON'S ADMR.

Exceptions, Bill of—Judgment Will be Affirmed in Absence of Bill.

Where there is no bill of exceptions in the record, the Court of Appeals will presume that the judgment was based on sufficient evidence.

APPEAL FROM JEFFERSON CIRCUIT COURT.

June 7, 1872.

OPINION BY JUDGE HARDIN :

Without particularly disposing of other reasons for affirming the judgment, which have been urged by the counsel for the appellee, several of which seem to be sufficient, we must affirm the judgment, because, there being no bill of exceptions in the record, this court cannot know what evidence was heard by the court and must presume, therefore, that the judgment was based on sufficient evidence.

Wherefore the judgment is affirmed.

Lec & Rodman, for appellant.

O. H. Stratton, Bodley & Simrall, for appellee.

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ELIZABETH SHANKLIN *v.* ISAAC C. OVERBY, ETC.**Wills—Capacity—Influence—Conflicting Evidence—Second Verdict.**

The Court of Appeals will not reverse a second judgment against the validity of a will, where the evidence as to the capacity of the testator and the undue influence over her is conflicting, especially when it is in accord with the judgment of the county court.

APPEAL FROM FLEMING CIRCUIT COURT.

October 5, 1872.

OPINION BY JUDGE HARDIN:

The evidence in relation to the capacity of Margaret Shanklin to make a will and the influence of her sister, Elizabeth, over her, is so conflicting and unsatisfactory that we do not feel at liberty to reverse the judgment, based, as it is, on a second verdict against the validity of the will, found also in accordance with the judgment of the county court.

This judgment is therefore affirmed.

Botts, for appellant.

Andrews & Phister, for appellees.

 WOODFORD DOLLINS *v.* R. H. PERRY ET AL.
Infants—Sale of Real Estate—Judgment Voidable—Appeal is the Remedy Where Error Appears on Face of Record—Limitation.

All the alleged errors complained of by the appellants appear upon the record of the suit in which the judgment was rendered, as well as the fact that the appellants were then infants.

The construction given to section 579 of the Civil Code is that when the error complained of appears in the record and also the fact that the defendant is an infant or lunatic, etc., the remedy is by an appeal and not by petition to vacate the judgment.

Appeals and Errors—Judgments Against Infants—Limitation.

If the party defendant is an infant, married woman, or person of unsound mind at the time the judgment is rendered, then an appeal may be taken within one year after the disability is removed.

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Infants—Action to Sell Land of—Failure of Guardian ad Litem to Answer—Judgment Voidable.

The failure of a guardian ad litem to file an answer for an infant in a proceeding to sell his land does not render the judgment void, although it is a cause for reversing it.

Executors and Administrators—Suit to Settle Estate—Creditor Need Not File Answer.

In an action by an administrator to settle the estate of the deceased a creditor does not have to set up his claim against the estate by answer or other pleading, but he may present his side to the commissioner by vouchers as required by statute.

APPEAL FROM KENTON CIRCUIT COURT.

October 13, 1871.

OPINION BY JUDGE PRYOR:

Cary T. Allen, as the administrator of the goods, etc., of James Dollins, deceased, filed his petition in equity in the Kenton Circuit Court in the year 1852 for a settlement of the estate of the latter, alleging the insufficiency of the personal estate to pay the debts and asking for a sale of so much of the real estate left by the decedent as might be necessary for that purpose.

The widow of Dollins and his two infant children, Woodford and James C. Dollins, were made defendants to this action and served with process. The widow at the time was the statutory guardian of her two children. Sixty acres of the decedent's land was sold under the judgment rendered in this case to satisfy the indebtedness of the estate, and the appellee, R. H. Perry, became the purchaser. In 1866 the present suit was instituted by Woodford Dollins and James C. Dollins, the latter still being under age, by his brother as his next friend. The two children of James Dollins, deceased, for the purpose of vacating the judgment, rendered in the suit instituted by the administrator, Allen, in 1852, alleging that it was procured by the fraud and collusion of the administrator Allen and Perry, the purchaser, and also for various alleged errors appearing in the record in that suit.

By section 579, Civil Code, that court in which a judgment or final order is rendered shall have power after the expiration of the time to vacate or modify the judgment or order for various

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reasons therein assigned. Among the grounds enumerated in that section are the following:

Subsection 4. For fraud practiced by the successful party in obtaining the judgment or order. Subsection 5. For erroneous proceedings against an infant, married woman, or person of unsound mind when the condition of such defendant does not appear in the record nor the error in the proceeding.

Subsection 8. For errors in a judgment shown by an infant in twelve months after arriving at full age as prescribed in section 421. Civil Code, 421, reads: "It shall not be necessary to reserve in a judgment or order the right of an infant to show cause against it after his attaining full age, but in any case in which but for this section, such a reservation would have been proper, the infant within twelve months after arriving at the age of twenty-one years, may show cause against such order or judgment."

All the alleged errors complained of by the appellants appear upon the record of the suit in which the judgment was rendered now sought to be vacated, as well as the fact that the appellants were then infants, except the one based upon the alleged fraud of the parties. The construction given to section 579 of the Civil Code is that when the errors complained of appear in the record and also the fact that the defendant is an infant or lunatic, etc., the remedy is by an appeal and not by petition to vacate the judgment.

Subdivision 8 of this section providing that "for errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section 421, does not conflict with subdivision 5 of the same section, but is intended to apply to errors in a judgment not appearing in the record, or in the judgment itself. Any other construction would render the 5th subdivision of this section inoperative.

By section 884, Civil Code, a party against whom a judgment or final order is rendered has three years after its rendition to bring the case to this court by an appeal, and if a party defendant is an infant, married woman or person of unsound mind at the time the judgment is rendered, then an appeal may be taken within one year after the disabilities are removed. It certainly was not intended that the party laboring under the disabilities

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could proceed both by petition and appeal to complain of the errors in the judgment when these errors are found in the record, and for which this court would reverse the judgment.

The proper construction of this provision of the Code is that when errors appear in the record the remedy is by appeal or otherwise by petition. The appellants have failed to show any fraud in this case either upon the part of the administrator, Allen, or the vendee of the land, Perry. The proof of nearly all the neighbors shows that the land sold for a full and fair price; that it was sold more at the urgent solicitation of the widow and Woodford Dollins than from any desire on the part of the administrator.

The decedent himself expressed his wish during his last illness that this particular tract of land bought of Carmeal should be sold. He had incurred a large debt by purchasing this property and mortgaged his own tract of land adjoining it to secure the payment. The land was not very productive and the widow, after her husband's death, instead of accumulating means by cultivating the farm was continually increasing her indebtedness. It is true that Perry, after the purchase of the land and improving it, sold it for an increased price. This was doubtless owing to a sudden increase in the value of real estate, and the improvements made upon it. The land has been sold several times since the purchase by Perry, valuable improvements placed upon it, and the appellant, Woodford Dollins, lived adjoining with a full knowledge of the sales and the existence of the alleged fraud and has never asserted his supposed rights until eight or ten years after his arrival at age, when he institutes this suit. He certainly is in no condition to disturb the sales made to innocent purchasers.

Administrator Allen, however, as well as Perry, seems to have acted in good faith, and with the purpose and desire upon his part to advance the interest of the widow and children. The property sold for its full value and on this account the appellants cannot complain. The appellants insist that the sale is void. First, because the guardian ad litem failed to answer the petition for the infants. Second, because the creditor, Carmeal, who held a lien or mortgage on the property to secure his debt failed to make his answer a cross-petition with services of process on

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the infants in order to subject it. Third, for the reason that the judgment was for more than the indebtedness. Fourth, that certain payments to be made for the land by the terms of the sale were for cash in hand.

This court, in the case of *Thornton, etc., v. McGrath*, 1 Duval 350, decided, that the failure of the guardian ad litem to answer did not render the decree void, although it was cause for reversing the judgment. It was unnecessary for Carmeal to file any cross petition as against the infant defendants on the original petition. The original petition was filed by the administrator to subject the land of the infants decedent to them from the father to pay the debts and the debt of Carmeal was one of the debts mentioned and he made a defendant to the action. A sale of the land would have been proper if Carmeal had not filed his answer at all but presented his side to the commissioner in the shape of vouchers as required by statute.

The judgment in the case was only for the real amount of Carmeal's debt, and although the commissioner's report is defective, still on the rendition of the judgment the land was sold for only the real indebtedness of the decedent. The sale for cash is irregular, but as the cash payments were small, and the other credits extended to the time at which Carmeal's payments fell due, it was certainly to the interest of the estate to prolong these payments in order to obtain the best price possible for the land.

There are other errors complained of, some of which might be cause for reversal, but all combined will not render the judgment void. We perceive no reason for disturbing the judgment of the court below, and the same is affirmed.

Stevenson & Myers, for appellant.

Fisk, Pryor & Chambers, for appellee.

ED. SQUIRES v. M. A. HANCOCK.

Breach of Marriage Promise—Lewd and Lascivious Conduct—Defense—Demurrer.

In the second paragraph of appellant's answer he charges that appellee was before and after the date of the alleged and pretended

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contract, guilty of lewd and lascivious conduct, such as showed her to be unchaste and unfit for a wife, of which he had no knowledge at the times specified, and all of which was against his consent.

Held, that the words lewd and lascivious each import, not only great moral delinquency, but the actual unlawful indulgence of lustful passions, and such indulgence by one of the parties to a contract to marry, without the procurement or fault of the other, would present a sufficient legal excuse for the refusal of the party not in fault to execute the contract.

Breach of Marriage Promise—Instruction to Jury.

An agreement to marry is like all other agreements in which the undertakings of the parties to it are to be performed at the same time, and where the obligation and duty of either to perform his or her undertaking necessarily depends upon the concurrent performance of the other, cannot, of course, be carried out except by the mutual consent, good faith and contemporaneous action of both the contracting parties—hence, neither party can be said to be in default or guilty of a breach of such agreement to marry the other unless the other is ready and willing to be married at the time and place agreed upon.

APPEAL FROM ADAIR CIRCUIT COURT.

October 17, 1872.

OPINION BY JUDGE PETERS:

In an action brought by appellee against appellant for breach of contract to marry her, she alleged in her petition that appellant contracted, and with the plaintiff agreed and promised to marry her within a reasonable time, and at various times during the year 1869 agreed and promised to marry her and become her husband, and for "this" purpose a day was fixed to consummate said contract of marriage; that the same was mutual, and that plaintiff was ready and offered to consummate the contract at the time fixed and agreed upon; but that defendant had failed and refused to comply on his part; has abandoned his home, and removed to another state where he has remained for an unreasonable length of time.

In an amended petition she alleged that the defendant, by paying his addresses to her as her suitor for five years prior to the time set out in her original petition, obtained her affections, she being then and still a single woman, and he an unmarried man;

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that at the time stated in her original petition they mutually agreed to marry, and from the time of the making said agreement she had been ready and willing to consummate the marriage, of which the defendant was notified. That at the time of making said contract she was chaste and virtuous, but the defendant, not regarding his promise, and wrongfully, wickedly and fraudulently intending at the time by craft and artifice to deceive and injure her, and blight her reputation, did not, nor would not at the time aforesaid, nor since, consummate said agreement, but has hitherto failed and refused, and still doth fail, etc.

The petition was further amended by the addition of a count, or paragraph, for seduction, but as that was abandoned on a rule against appellee to elect for which cause of action she would proceed, no further attention need be given to that paragraph.

The answer as at first presented contained seven paragraphs, and subsequently another was added as "No. 9." Appellee demurred to each paragraph thereof, and her demurrer was sustained to the 2nd, 4th, 5th and 7th and overruled to the others. And the first objection taken to the ruling of the Circuit Court is in adjudging said paragraphs insufficient.

In the second paragraph appellant charges that appellee was before and after the date of the alleged and pretended contract guilty of lewd and lascivious conduct, such as showed her to be unchaste and unfit for a wife, of which he had no knowledge at the times specified, and all of which was against his consent. The words lewd and lascivious each import not only great moral delinquency, but the actual unlawful indulgence of lustful passions; and such indulgence by one of the parties to a contract to marry without the procurement or fault of the other would present a sufficient legal excuse for the refusal of the party not in fault to execute the contract. It was, therefore, error in the court below to sustain the demurrer to the second paragraph of the answer. As to the fourth and fifth paragraphs, the defendant, from all that is alleged, may have broken his contract with appellee, and the offense charged therein may have been committed after the breach of said contract by him, and may have been induced by his own misconduct, and the demurrers were properly sustained to them.

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As to the seventh, no facts were stated to show that the consideration for the contract was illegal or immoral, but the statements are mere conclusions of law and therefore not sufficient.

As to the paper denominated a reply, it certainly was unauthorized, and by the terms of section 132, Civil Code, prohibited, the court below should not, therefore, have permitted it to have been filed. If it contained any material averment, appellee could have gotten the benefit of it by way of amended petition.

Instructions marked "A," "B," "C" and "D" were given on behalf of appellee, and appellant excepted to the opinion of the court in giving them, and complains to this court that said instructions were erroneous, and prejudicial to him.

The first one of them reads as follows:

"If the jury believe from the testimony that there was a mutual agreement between plaintiff and defendant to marry within one year next before the plaintiff filed her petition herein, the law is for the plaintiff, and the jury ought to find such sum in damages as from all the facts and circumstances proven in the case they think proper, not exceeding the amount claimed in the petition. In estimating the damages, the jury may take into consideration as well the facts and circumstances proven in the case, as any of the pleadings on the part of defendant which may not be proven to be true."

To this instruction there are two fatal objections. Appellee, in her original petition, alleged that the defendant and herself had mutually agreed to marry, and for the consummation of the marriage a day was fixed, and that she was ready, and offered to marry the defendant on the appointed day.

In *Fible v. Caplinger*, 13 B. Monroe 464, which was an action for breach of promise to marry, the court said: "An agreement to marry is like all other agreements in which the undertakings of the parties to it are to be performed at the same time, and where the obligation and duty of either to perform his or her undertaking necessarily depends upon the concurrent performance of the other, can not, of course, be carried out except by the mutual consent, good faith and contemporaneous action of both the contracting parties—hence neither party can be said to be in default, or guilty of a breach of such agreement to marry the other unless the other is ready and willing to be married

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at the time and place agreed upon for the actual consummation of the marriage; or if no time and place were by consent of the parties fixed for the performance of the contract, neither party can be in default, nor has either violated their pledged faith, or broken their agreement until the other has proposed and made the offer to fix the time and place and to fulfill the agreement."

If a time and place are alleged to have been fixed for the consummation of the marriage, and it is also alleged that the plaintiff was ready and willing on the day and at the place to consummate the marriage and there and then offered to marry the defendant, and he failed to attend, or, being present, refused to marry her, that would be a breach for which the action could be maintained.

But if no time or place was fixed by the parties, then the plaintiff, in order to enable her to maintain an action for a breach of promise, must have requested the defendant to perform his engagement, or to fix the time and place for performance, and notify him that she is ready and willing, and actually offer to perform the contract on her part, then if he fail or refuse to comply he is guilty of a breach, and her cause of action is complete against him.

In the instruction given the court fails to tell the jury that they must believe from the evidence that either of the states of case presented existed in order to find for the plaintiff, and refused to give instruction No. 2, asked by appellant—which the court should have qualified according to the principles herein suggested and given.

Moreover, the paragraphs of appellant's answer to which appellee's demurrer had been sustained were for all purposes out of the cause as long as the judgment of the court on the demurrer remained in force, and being out of the cause, it was error prejudicial to appellant to tell the jury that in estimating the damages they might take into consideration any of the pleadings on the part of the defendant which may not be proven to be true. Appellant would not have been allowed by the court to have introduced evidence to sustain the facts alleged in the paragraphs which had been adjudged insufficient on demurrer, and surely, if the court would not permit him to introduce proof to sustain them, it would be a hard rule to prejudice him

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because he failed to do that which the court would not allow him to do.

The court below properly refused to give the fifteen instructions asked by appellant, as he gave in the three immediately following the law as favorably as he had a right to ask it.

But for the error in sustaining the demurrer to the second paragraph of the answer, and in giving instructions "A" as asked, the judgment is *reversed*, and the cause remanded for a new trial, and for further proceedings conformable hereto.

Garnett, for appellant.

J. D. Fogle, for appellee.

THOMAS SHERCLIFF, ETC., v. P. P. COOPER & JARBOE.**New Trial—Reversal—Appellant May Make a Better Case.**

Where a case is remanded for a new trial, the appellant has a right to make a better case if he can and have judgment in the event he should show himself entitled to it, otherwise a new trial would be a mere farce.

Attachment—Discharge—Reinstatement—Presumptions.

Where an attachment has been discharged by the circuit judge and reinstated by a judge of the Court of Appeals, it will be assumed that the discharge and reinstatement were made on the merits of the case, and such presumption is entitled to a controlling influence.

APPEAL FROM MARION CIRCUIT COURT.

November 4, 1872.

OPINION BY JUDGE LINDSAY:

The opinion of this court, reversing a judgment formerly rendered in this case in favor of Hill's administratrix, as appears upon its face, was based upon a state of facts wholly different from that now presented by the bill of exceptions.

Upon the former trial, Hill's representative rested on the discharge of the order of attachment without any other evidence of its being wrongfully sued out, whilst Cooper proved supplemental facts conducing to show sufficient cause for it. Besides this, it then appeared to this court that the attachment had been discharged by the circuit judge and reinstated by a judge of this

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court after full preparation, and this court assuming, as it then had the right to do, that the discharge and reinstatement were made upon the merits of the controversy, were of the opinion that the reinstatement strongly implied that the proof showed sufficient ground for it, and held that in a case like this, such presumption should be entitled to a controlling influence, and expressed the opinion that as the case was then presented Hill's administratrix was entitled to no more than the legal costs taxable on the dismissal of the attachment suit. Notwithstanding this expression of opinion, however, the cause was remanded for a new trial, and, of course, upon the new trial Hill's administratrix had the right to make out a better case if she could, and have judgment in the event she should show herself entitled to it, otherwise the new trial would be a mere farce.

The evidence upon which we are now called to pass conduces to show that the attachment suit had not been fully prepared when the order was discharged and reinstated, but that much the larger portion of the preparation was made afterwards. It also is made to appear from the testimony of the circuit judge that the attachment was not discharged on its merits at all, but because he was of opinion that the clerk had not the right to grant it. Had these facts been before this court upon the former appeal, it may be safely assumed that the presumption arising from the reinstatement by the appellate judge would not have been indulged in.

Further than this, there is evidence conducing to show that the attachment was sued out without cause. Under such a state of case the jury might have concluded that appellant was at least entitled to recover reasonable attorney's fees for defending the attachment, and such other actual damages as had been sustained by reason of it. It was, therefore, error for the circuit judge to peremptorily instruct the jury to find for defendants.

Judgment *reversed*, and cause remanded for a new trial upon principles consistent with this opinion.

Judge Hardin did not sit in this case.

C. S. Hill, for appellant.

Harrison, for appellee.

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THOMAS SHERCLIFF v. P. P. COOPER, ETC.**Appeals and Errors—Administrator de Bonis Non May Appeal from Judgments Rendered Against Predecessor.**

The judgment dismissing the petition of Hill's administratrix at her cost was not a judgment against her personally, but in her fiducial character. Her right to prosecute an appeal therefrom was not a personal but a fiducial right, existing so long as she continued to act as administratrix. Her marriage divested her of the right longer to act in that capacity, but did not deprive Hill's estate or its representative of the right to appeal.

Parties—Misjoinder—Motion to Strike Out.

A misjoinder of plaintiffs in the lower court or of appellants in the Court of Appeals must be taken advantage of by motion to strike out the name of the party improperly joined.

APPEAL FROM MARION CIRCUIT COURT.

December 13, 1872.

OPINION BY JUDGE LINDSAY:

The motion to dismiss this appeal was acted on and overruled by this court, before the judgment of reversal was entered, but the reasons therefor were not given in writing. The importance which counsel seems to attach to this motion induces us to respond in writing to that portion of his petition relating thereto. Sec. 876, Civil Code, gives to the clerk of this court the right to grant an appeal, on application of the party dissatisfied with the judgment in the court below.

The judgment dismissing the petition of Hill's administratrix at her costs was not a judgment against her personally, but in her fiducial character. Her right to prosecute an appeal therefrom was not a personal but a fiducial right, existing only so long as she continued to act as administratrix. Her marriage divested her of the right longer to act in that capacity, but did not deprive Hill's estate or its representative of the right to appeal.

The record of the Marion county court, adjudging that she had vacated her office as administratrix by her marriage, and appointing Shercliff her successor, is duly attested, and when presented to the clerk of this court showed a prima facie right on his part to prosecute the appeal.

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The provisions of the Codes of Practice, when not restricted in their application in terms, or by their peculiar nature apply to all the courts of this state, section 766. As a personal representative has the right to sue, whether originally appointed, or appointed to fill the place of one who has resigned, died or otherwise vacated his office, so may he prosecute an appeal from a judgment affecting the estate he represents. If, in point of fact, he is not what he claims to be, this is a matter of defense to be brought before the court by answer. If Shercliff is not administrator *de bonis non* of Hill's estate, or if the order appointing him such is void, appellee should have answered and set up such fact or facts as allowed by section 898 of the Code. If a personal representative dies pending litigation in the Circuit Court, this fact, together with that of the appointment of his successor, may be suggested of record. If the litigation has terminated in the lower court, so that the suggestion can not be made there, it may be made to the clerk of this court, as was done in this case when the appeal was prayed and granted. It seems to us manifest that the Legislature did not intend to, and did not leave a contingency like this unprovided for, and we feel assured that in permitting this appeal to be prosecuted we were not compelled to usurp any of the powers of the legislative department.

The error in joining Wheatly and wife with Shercliff as appellants did not authorize a dismissal of the appeal. A misjoinder of plaintiffs in the Circuit Court or of appellants in this court must be taken advantage of by a motion to strike out the name of the jury improperly joined. *Dcan v. English*, 1 B. Monroe 136.

We will not discuss the evidence presented by the record and thereby usurp the province of the jury to be empaneled on the next trial. We can not, however, refrain from saying that counsel is mistaken in the assertion that there is no evidence tending to show that a special contract was made to pay attorneys' fees for defending the attachment. The bill of exception shows that the witness Hill stated explicitly that Governor Wickliffe was engaged at a fee of two hundred dollars for defending the attachment alone, whether a recovery should be had for Hill's fee or not is a question upon which it is not proper for us to speak at this time. There is nothing in the opinion of this court intimat-

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ing that the basis of recovery for attorneys' fees, if a recovery should be had at all, ought to be different from the rule prescribed in the cases of *Shuety v. Marimon*, 3 *Metcalfe*, and in *Doe v. Perkins*, 8 *B. Monroe*.

The motion of appellee to file his amended petition is not now before this court. That motion had been overruled prior to the first appeal. This court did not pass upon it, and appellee failed to renew it after the return of the cause, and voluntarily went to trial with the pleadings in their present condition. Upon the return of the cause he can again ask to file it, if he sees proper to do so.

Petition overruled.

C. S. Hill, for appellant.

Harrison, for appellee.

W. A. CRIDER *v.* PETER SMITH, ETC.

Pleadings—Amendment After Reversal—Discretion of the Court.

The appellant chose to stand by his original answer. He might then have amended and set up the matters contained in the amendment he offered to file on the return of the case, and it was his duty to have done so. He does not claim that he has discovered the defenses now sought to be made since the first trial in the Circuit Court.

APPEAL FROM OLDHAM CIRCUIT COURT.

November 1, 1872.

OPINION BY JUDGE LINDSAY:

Although it was within the power of the Circuit Judge to permit further pleading upon the part of appellant upon the return of this cause to his court, yet we cannot say that he abused a sound discretion in refusing to permit either of the amended answers offered to be filed.

Appellant chose to stand by his original answer, when the demurrer to it was sustained. He might then have amended, and set up the matter contained in said two amendments, and it was his duty then to have done so. He does not claim that he has

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discovered the existence of the defenses now sought to be made since the first trial in the circuit court, and offers no explanation of his failure or refusal to rely upon them at that time.

The judgment appealed from must be *affirmed*.

DeHaven, Rodman, for appellant.

Carroll, Lee & Rodman, for appellees.

WILL CARTER *v.* THE COMMONWEALTH.

Criminal Law—Indictment for Murder—Instruction on the Law of Manslaughter—Right of Jury to Pass on Facts.

The refusal of the court to instruct as to the law of manslaughter left the jury no alternative except to acquit the accused upon the grounds of self-defense or find him guilty of murder. The court ought not, by refusing to instruct, deprive the jury of the right to deduce from the facts proven the conclusion that the offense committed, if any, is of a lower grade than that charged in the indictment. By refusing to instruct as to the law of manslaughter the court judiciously determined that the evidence did not authorize the jury even to entertain a reasonable doubt as to the grade of the offense committed.

Criminal Law—Instructions—Undue Prominence of Facts.

It is attempted by Instruction No. 4 to group together certain facts, i. e., threats, previous encounters and the character of the deceased and to give them undue prominence by making the question of guilt depend upon their existence or non-existence. It was for the jury and not the court to determine whether or not, when considered in connection with all the evidence in the case, they justified the conclusion that the accused at the time of the killing believed and had reasonable grounds to believe that he was then in imminent danger of losing his life or suffering great bodily harm at the hands of the deceased.

APPEAL FROM FAYETTE CIRCUIT COURT.

November 19, 1872.

OPINION BY JUDGE LINDSAY:

In view of instructions given on the motion of the attorney for the commonwealth, and the refusal of the circuit judge to instruct as to the law of manslaughter, left the jury no alternative

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except to acquit the accused upon the ground of self-defense or find him guilty of murder. In criminal prosecutions in this state all issues of fact must be tried by the jury.

The court has the power and it is its duty to determine questions of law. It must, when the evidence shall be concluded, upon the motion of either party, instruct the jury in writing on the law applicable to the case. Amendment of August 31, 1862, to section 226, Criminal Code of Practice. In giving and refusing instructions the court shall avoid encroaching in any degree upon the right of the jury to pass upon the facts. This right is an exclusive one, and the jury should be allowed to exercise it unembarrassed by suggestions from the court as to the weight or consideration which the testimony or any part of it should receive, and the court ought not, by refusing to instruct, to deprive the jury of the right to deduce from the facts proved the conclusion that the offense committed, if any, is of a lower grade than that charged in the indictment. Under the indictment in this case appellant might have been convicted of manslaughter.

He claims that the evidence conduces to show that he acted under sudden heat and passion when he shot and killed the deceased. We forbear to intimate an opinion as to whether such an inference can be legitimately drawn from the facts proved, but are of opinion that the court erred in declining so to instruct the jury, that they might, in case they entertained from the evidence a reasonable doubt as to whether the killing was murder or manslaughter, have given to the appellant the benefit of this doubt.

In civil cases this court has held that it was improper to take from the jury the right to decide upon the facts, and the inferences which they might authorize, that if from any allowable deduction from the facts proved a course of action might be sustained, it was erroneous to instruct peremptorily in favor of the defendant. *Rowland v. Hanna*, 2 B. Monroe, 129; *Fightmaster v. Beasley*, 7 John Marshall 411.

By refusing to instruct as to the law of manslaughter the court judicially determined that the evidence did not authorize the jury even to entertain a reasonable doubt as to the grade of the offense committed in case they should conclude that the plea of self-defense was not sufficiently made out. We are constrained to hold that this refusal had the effect of taking from

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the jury the right to pass upon the facts and that it is a reversible error.

We cannot approve the manner in which instruction No. 4, asked for by appellant and modified by the court, is drafted. It is attempted therein to group together certain facts, i. e., threats, the previous encounter, and the character of the deceased, and to give them undue prominence by making the question of guilt depend upon their existence or nonexistence. All these facts were properly before the jury in evidence, and it was for the jury, and not the court, to determine whether or not when considered in connection with all the evidence in the case they justified the conclusion that the accused at the time of the killing believed, and had reasonable grounds to believe, that he was then in imminent danger of losing his life, or sustaining great bodily harm, and that there was no other means to escape the continual impending danger made imminent by the presence of his foe except to slay him. If he had the right to and did so believe, and did not unnecessarily bring about the meeting, then under the law of self-defense as announced by this court in the case of Bohannon, 8th Bush 481, he was neither obliged to fly for safety nor to await the attack of his enemy. The modification made to the fourth instruction by the court was certainly calculated to mislead, and should have been omitted.

The judgment of conviction for murder is reversed and the case remanded for a new trial upon principles consistent with this opinion.

Huston, for appellant.

JAS. T. DONALDSON, ETC., v. SAMUEL A. BARCLAY, ETC.

Trust—Trustee Cannot Purchase for Himself Trust Property at Decretal Sale.

A trustee occupies such a position as to preclude him from purchasing for his own benefit, trust property from the commissioner under a sale made pursuant to a judgment rendered before he became trustee.

Trust—Power of Trustee to Sell Trust Property—Grantor in Deed of Trust Must Join in Conveyance by Trustee.

In order to make valid the conveyance of the trustee it is necessary that the grantor in the trust deed shall join in its execution in

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all cases in which he retains any interest in the trust property or is directly interested in the execution of the trust.

APPEAL FROM WARREN CIRCUIT COURT.

September 5, 1872.

OPINION BY JUDGE LINDSAY:

J. T. Donaldson and J. M. Herdman accepted the trust reposed in them by C. B. Donaldson and undertook to pay off and satisfy the sums necessary to redeem the property described in the trust deed from the execution purchasers and to make such arrangements as could be made with the various mortgagees to bring about a suspension of the judgment sale of the property, and in the meantime to make sale of it themselves and apply the proceeds to the payment of the debts of the grantor named in the trust deed.

There is nothing in the record showing that the trustees made any effort whatever to induce the judgment creditors to suspend the execution of the decree in their favor, and four months after their acceptance of the trust, J. T. Donaldson became the purchaser, at commissioner's sale, of a portion of the trust property. There is some evidence tending to show that he bought it in the capacity of trustee and to enable himself and his co-trustee, Herdman, to execute the trust, but whether this was or was not his object, he occupied a position which precluded him from purchasing for his own benefit. It does not matter that he purchased from the court's commissioner, and at a sale made pursuant to a judgment rendered before he became trustee.

It was his duty to make such arrangements with the plaintiffs in the judgment as would have prevented the sale from being made, and as he failed to make even a reasonable effort to perform this duty, he cannot protect himself in his purchase by relying upon the fact that the sale was made and confirmed by a court of chancery.

Nor do we agree with the learned counsel that Barclay is precluded from prosecuting his cross-action against Donaldson because of the fact that he was a party to the original suit in which the judgment for the sale was rendered and failed to object to the confirmation of Donaldson's purchase.

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He does not seek now to disturb that purchase but merely to have the chancellor determine the character of estate Donaldson acquired under it, and to compel him to execute a trust which his purchase neither terminated nor impaired.

We perceive no error in the judgment of the special chancellor so far as it relates to this branch of the litigation.

In the late case of *Prather, etc., v. McDowell and Wife*, to be reported in 8th Bush (page 46), the power of trustees to sell trust property was considered and all the cases in which the construction of the act of 1820 was involved were carefully reviewed. It was the conclusion of the court that in order to make valid the conveyance of the trustee it is necessary that the grantor in the trust deed shall join in its execution in all cases in which he retains any interest in the trust property, or is directly interested in the execution of the trust. The same rule of construction is applicable to the 24th section of Chapter 84 of the Revised Statutes. Charles B. Donaldson has an interest in the property conveyed to J. G. Donaldson and J. M. Herdman. He is the equitable owner of it, subject to the payment of the debts set out in the deed of trust, and upon their payment will be entitled to have restored to him the legal title to any surplus that may remain.

Hence, the conveyance to Barclay by the trustees alone did not "pass the title" of the property attempted to be conveyed, and the chancellor erred in adjudging that it did.

His judgment upon this question was such a final order as authorizes an appeal. For the error indicated, the judgment holding valid the conveyance to Barclay is reversed. To the extent that the amount paid by Barclay was applied to the payment of execution liens, or to the satisfaction of debts embraced by the deed of trust, he should be allowed a prior lien upon the property he attempted to purchase, and any portion of the purchase price that may remain in the hands of the trustees should be restored to him. The cause is remanded for further proceedings not inconsistent with this opinion.

The question of interest and rents between Barclay and Donaldson, trustees, should be adjusted upon equitable principles.

Underwood, Garvin, for appellants.

James H. Bowden, Dulaney, for appellees.

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BURGESS EATON, ETC., v. CHAS. T. REDMAN, ETC.

Wills—Advancements—Term “Money or Property” Construed.

“All the money or property that is charged by me to each one of my children in a book kept by me for that purpose is to go and be counted as a part of my estate received by them and as a part of a share thereof to which they are entitled under this will as well as that now charged or that I may hereafter charge any of them with.”

Held, that the advancements made to the daughters should be charged to their children, as it is evident the testator did not mean to charge his sons with advancements and except his daughters therefrom. The term “money or property,” as used by the testator, included the rents charged against such of his children as were occupying portions of his lands.

APPEAL FROM CLARK CIRCUIT COURT.

June 11, 1872.

OPINION BY JUDGE LINDSAY:

Robert Redman, who departed this life in the year 1868, provided by his will that his four sons should have four-tenths of his estate, after the payment of his debts, and certain specific legacies, the same to be yearly divided between them, “that is, each one of them was to have one-tenth part thereof,” the remainder of his estate he devised to such of the children of his six daughters as might be living at the time of his death, to be divided between them per capita, except that the children of one of his daughters were to have only half shares. Such of his daughters as were living at the time of his death were to have the use and benefit for life of such portion of his estate as should fall to their children, and upon the death of each daughter the property thus derived was to vest in her children absolutely. The fourth clause of the will is in these words:

“All the money or property that is charged by me to each one of my children in a book kept by me for that purpose is to go and be counted as a part of my estate received by them and as a part of a share thereof to which they are entitled under this will, as well as that now charged, or that I may hereafter charge any of them with.”

Appellants complain that the grandchildren were charged with the advancement made to their mothers, and insist that,

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as by the terms of the will these charges were confined to the children of the testator, this action of the court below was unauthorized.

It is evident that the testator did not mean to charge his sons with advancements and except his daughters therefrom. Had this been his intention he would not have used the term children, which includes as well the daughters as the sons. Besides this, if the advancements to his ten children "be carried as a part of his estate," as he directs, and the distribution made upon the basis of the aggregate then obtained, to charge the sons with the advancements made to them and except the grandchildren from the payment of the sums advanced to their mothers would result in giving to the grandchildren nearly the entire estate of which the testator died seized.

We think it clear that he intended each of his sons, and the representatives or children of each of his daughters, to account for the amounts charged against them and their mothers in the book kept by him for that purpose and referred to in his will.

We are also of opinion that the terms "money or property," as used by the testator, include the rents charged against such of the children as were occupying portions of his lands. That he intended these rents to be charged against them as advancements is manifested by the fact that the rate is fixed in the book kept by him for that purpose. The receipt executed to his sons bearing date January 1, 1861, which was anterior to the execution of the will, exonerates them from the payment of such rents as may have then accrued, but they are responsible for all accruing subsequent to that date. The court erred in not requiring Charles T. Redman to account for the rents charged against him.

The receipt bearing date October 30, 1867, does not upon its face import to have been given for money paid in discharge of rents. It is in full of all demands. The testator did not regard the rents charged against his children as demands at all, but as advancements for which they were to account after his death. Nor is the oral testimony offered in explanation of the receipt detailing the conversation between Charles and his father at the time of its execution, even if it or the receipt itself were admissible for the purpose of changing the rights of the devisees under the will of that character which would authorize

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the conclusion that the testator intended by its execution to exonerate Charles from accounting for the rents charged against him in the book referred to in the will.

For error in failing to charge Chas. T. Redman with these rents the judgment is reversed, and the cause remanded for the correction thereof and for other proper proceedings.

The costs upon this appeal will be taxed against Chas. T. Redman.

Breckenridge & Beckner, for appellants.

Simpson, for appellees.

J. C. CALDWELL v. CHAS. BAKER.

Injunction—Liability on Bond—Dissolution.

Although the action of trespass might have been maintained by the appellee for the destruction of his corn by the appellant, still this does not preclude him from his action against the appellant for the damages sustained by reason of the injunction. After the dissolution, and not before, the appellee was entitled to gather his corn, but in the meantime it had been gathered by appellant, therefore he was entitled to his corn or the proceeds.

APPEAL FROM HICKMAN CIRCUIT COURT.

September 27, 1872.

OPINION BY JUDGE PRYOR:

Although an action of trespass might have been maintained by the appellee for the destruction of his corn by the appellant, still this does not preclude him from his action against the appellant for the damages he sustained by reason of the injunction.

This injunction was not dissolved until September, 1867, and by it the appellee was restrained from gathering his corn. He had no right to gather it until the dissolution of the injunction, as it was to prevent this act on his part that the injunction was obtained. After its dissolution and not before he was entitled to gather, use and dispose of it, but in the meantime it had been gathered by the appellant or destroyed. The appellant could not maintain his action for damages by reason of the wrongful restraint put upon him by the injunction until its dissolution, and

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when dissolved he was entitled to his corn or the proceeds.

The judgment is *affirmed*.

W. R. Bradley, for appellant.

Silvertooth, for appellee.

CLEVELAND & SCOTT v. PHILLIPPS & ISON.

Injunction—Action on Bond—Petition—Demurrer.

The petition alleges the execution of the injunction bond, the dissolution and the dismissal of the action. It also recites the amount of the judgment enjoined and the failure of the appellants to pay. The demurrer therefore was properly overruled.

APPEAL FROM JESSAMINE CIRCUIT COURT.

September 29, 1871.

OPINION BY JUDGE PRYOR:

We perceive no error in the judgment rendered in this case.

The petition alleges the execution of the injunction bound by the appellant, the dissolution of the injunction and the dismissal of the action; it also recites the amount of the judgment enjoined and the failure of the appellant to pay, etc. The demurrer therefore was properly overruled.

The answer filed by the appellants presented no defense to the action. They admit the execution of the bond, and in an absence of a compliance with its conditions are liable for the amount of the judgment enjoined.

The judgment is *affirmed*.

Huston, for appellants.

Bronaugh, for appellees.

WILLIAM TOWNSEND v. COMMONWEALTH.

Homicide—Opinion of Witnesses—Competency.

The rejected statements of the witnesses were their own deductions merely, from the facts to which they were called to testify, which it was not their province, but that of the jury, to do.

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Homicide—Involuntary Manslaughter—Instructions.

The court instructed the jury that unless they are satisfied from all the evidence beyond a reasonable doubt that the prisoner purposely and intentionally shot Holder they must find him not guilty, which was more favorable to appellant than he was entitled to.

APPEAL FROM POWELL CIRCUIT COURT.

November 9, 1872.

OPINION BY JUDGE HARDIN :

Upon an indictment charging the appellant with the murder of Werden Holder, he was tried and convicted of the lesser crime of voluntary manslaughter, and sentenced to a term of ten years, and this appeal is prosecuted for a reversal of that judgment.

Before proceeding to consider the questions of law, on which alone it is the province of this court to revise the judgment, it is, perhaps, necessary to advert briefly to the evidence, which in our opinion rather conduces to sustain the charge as laid in the indictment, or to prove the appellant guilty of the involuntary killing of Holder, in the perpetration of an unlawful act, which was criminally reckless, and in its nature tending to violence and bloodshed, than to show the homicide to have been committed without malice and upon sudden quarrel, or in the heat of passion.

It appears that the appellant and the deceased, together with several other persons, were, at the time of the killing, assembled at the residence of a man named Hatton, on the occasion of the marriage of his daughter, and that for amusement a mock military drill was instituted in which the appellant assumed to act as commanding officer and as such ordered the deceased, who would not participate in the drill, "to fall into line," threatening to shoot him if he did not do so, and the deceased still refusing to obey the order, the appellant drew a pistol and placing it against the head of the deceased, discharged it purposely or by accident, killing him instantly, and thereupon fled from the place.

Although there is but little contrariety of evidence, as to the manner of the killing, some of the witnesses testified as to their opinion or belief from the appellant's "movements and appearance" at the time, that the killing was not done intentionally,

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but by accident; and the Court holding this evidence to be incompetent, excluded it from the jury; and this ruling presents the first question, in the case, for the determination of this Court.

The subject of the opinions offered in evidence in this case, is not like the identity of a person, or a particular handwriting, and many other facts of the same class, which are, in their nature so dependent, as matters of proof, on the recollection and belief of those who may testify concerning them, that of necessity the opinions of the witnesses are admissible as the means of communicating the fact under investigation; but the rejected statements of the witnesses were their own deductions merely, from the facts to which they and others were called to testify; which, it was not their province, but that of the jury to do; and the Court therefore properly excluded the evidence.

The action of the Court in giving instructions to the jury, without certain modifications proposed by the counsel for the defendant, is complained of as erroneous. But we fail to perceive that the Court, in so ruling, committed any error to the prejudice of the appellant. It is true, the Court, in its first instruction very concisely indicated to the jury the facts which were essential and necessary to constitute the crime of murder, without reference to the law of self-defense. But there was no evidence on which an instruction as to the excuse of self-defense could properly have been based; and notwithstanding this, the Court in another instruction, correctly informed the jury, in effect, that if from the evidence they entertained a reasonable doubt on the question whether the defendant was guilty of murder or manslaughter, they could only find him guilty of the latter crime; and still in another instruction the law of voluntary manslaughter is correctly defined.

It is insisted for the appellant however, that the Court should have so instructed the jury as to have authorized them, if they convicted him, to fix in their verdict the reduced degree of punishment provided in section 2, of Article 4, of Chapter 28 of the Revised Statutes, for the offense of wilful shooting without designing to kill, but from which death ensues within six months therefrom.

With reference to this objection we deem it sufficient to say that although no instruction was asked or suggested for the ap-

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pellant, under the provisions of the statute, just cited, the Court in its fourth instruction, to which no objections was made, instructed the jury, more favorably to the appellant, as follows: "That unless they are satisfied from all the evidence beyond a reasonable doubt, that the prisoner purposely and intentionally shot Holder they must find him not guilty."

As to the alleged error of the Court in excluding a juror for cause we need only refer to the decision of this Court in the case of *Moore vs. Commonwealth*, 7 Bush 191, as conclusive of the point, that such an objection is not an available ground of reversal in a case like this.

Wherefore the judgment is affirmed.

Turner, Riddle, for appellant.

MILES SKAGGS v. CYRUS H. MOORE.

Libel and Slander—Answer, Sufficiency of.

The first sentence of the third paragraph of the answer is as follows: "In answer to the third paragraph he says he did not speak of and concerning the plaintiff the defamatory words alleged to have been spoken, in manner and form as he has alleged."

Held, that the answer sufficiently and aptly pleaded not guilty to the charge.

APPEAL FROM GRAYSON CIRCUIT COURT.

October 12, 1872.

OPINION BY JUDGE HARDIN:

The plaintiff in this action, in his petition containing several paragraphs, sought to recover damages for alleged libel, and for slander in accusing him of the crime of perjury; and also on the further charge of slander, substantially alleged to have been committed by the defendant by saying in the presence of others falsely and maliciously concerning the plaintiff that he "had but three pecks of corn and that he had stolen that."

To these several charges an answer was filed; but as the finding of the jury was upon the last mentioned one of slander in accusing the plaintiff of stealing corn, the others being unsupported by the evidence, as held by the court, it is only necessary to consider the

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action of the court with reference to the pleadings concerning the alleged charge of larceny.

As to that, the first sentence of the third paragraph of the answer is as follows: "In answer to the third paragraph he says he did not speak of and concerning the plaintiff the defamatory words alleged to have been spoken, in manner and form as he has alleged."

Having thus, as we think, sufficiently and aptly pleaded not guilty to the charge, the defendant, without indicating the beginning of another paragraph by number, proceeded at some length, to set forth other matters, apparently in mitigation of damages, and also as the grounds of a counter claim, as alleged by him, for slanderous words spoken by the plaintiff, but, in effect containing an admission of the truth of the charge against himself. After the answer was filed the following order was made on the motion of the plaintiff: "It is ordered that all of the defendant's answer after the third paragraph be stricken out; to which opinion of the Court the defendant excepts."

To give this order any effect, we must construe it as applying to all of the continuation of the third paragraph, after the formal traverse of the plaintiff's charge as being in the opinion of the Court, mere surplusage and redundant matter. And this supposition is fortified by the fact, that, after the order was made, the Court overruled a demurrer to said paragraph. Yet upon the trial, the Court, inconsistently with its previous ruling, gave the following instruction, under which a verdict was found for \$350.00 in damages.

"The defendant by failing to deny admits that he spoke concerning the plaintiff these words, "He had but three pecks of corn and that he had stolen that," and that these words were false, the jury ought, therefore to find for the plaintiff such damages as they think right for the speaking of these words falsely of the plaintiff."

We can perceive no ground on which the action of the court in giving this instruction, so obviously inconsistent with its previous, and as we conclude, correct ruling, on the demurrer of the plaintiff, can be sustained.

The judgment, being therefore deemed erroneous, is reversed

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and the cause remanded for a new trial and other proceedings not inconsistent with this opinion.

Wintersmith, for appellant.

Conklin, for appellee.

SUSAN SHRADER v. S. B. LEWIS.

Bills and Notes—Possession by Payor Prima Facie Evidence of Payment.

Possession of a note by the payor if sufficiently proven is prima facie evidence of satisfaction and surrender in the absence of other evidence to explain the possession.

APPEAL FROM JEFFERSON COUNTY COURT.

October 30, 1872.

OPINION BY JUDGE HARDIN:

We do not see from the bill of exception, that the reading of the clerk's endorsement of the time of filing the answer of the defendant in another suit between the same parties was in any way relevant or pertinent to the issue submitted to the jury; and we therefore think, the matter so offered as evidence, should have been rejected.

We are further of the opinion that the Court erred in instructing the jury, as to the effect of the evidence conducing to show the note to have been in the defendant's possession in 1867. Such possession if sufficiently proved was certainly prima facie evidence of the satisfaction and surrender of the note, and it was proper to so instruct the jury leaving them free to judge from all the evidence, whether the note had in fact passed out of the possession of the plaintiff into that of the defendant or not. But the concluding words of the instruction, peremptorily required the jury to find for the defendant, if they believed from the evidence the defendant had possession of the note at any time in the year 1867, although there may have been other evidence to explain that possession consistently with the plaintiff's right to the note, or to overcome and rebut the presumption of payment arising from such possession; which was manifestly misleading and erroneous.

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Wherefore, the judgment is reversed and the cause remanded for a new trial and other proceedings not inconsistent with this opinion.

Russell & Helm, for appellant.

Mix, for appellee.

J. W. SEALE v. JOSEPH BRANDENBURG.

Boundaries—Immovable and Natural Objects—Course and Distance Must Yield—Corner Trees Corresponding with Patent.

Where the lines and corners correspond with the immovable and natural objects as fixed by the survey, the course and distances must yield and on the contrary when the lines and courses have been effaced courses in the patent must govern. Corner trees being proven to correspond with the calls of the patent is prima facie evidence that the survey was so located.

APPEAL FROM OWSLEY CIRCUIT COURT.

September 10, 1872.

OPINION BY JUDGE PRYOR:

The only difficulty presented in this case is in ascertaining the true boundary of the 2500-acre survey to Craig. As a means of ascertaining the real line and courses it was made necessary to survey the whole of the 5000 acre tract patented to Timothy Combs, the Craig tract forming a part of, and included by that patent. The report of the surveyor made in this case by one evidently conversant with such business, shows that the courses and distances as called for in the patent do not correspond with, or run to the corners as claimed by either party. The bend of the river laid down on the plat of the patent and where the line corners at letter D would never be reached by any of the surveys claimed by the appellant.

On the appellant's plan of survey from what is called the Buffalo corner to the river, this corner being in the north or back line of the survey, the distance to the river is 1520 poles when by the calls of the patent it would only be 900 poles.

The plaintiff has failed to establish any marked lines or corners, corresponding with those of the patent. The line as claimed by

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him terminates in different ground and at different natural objects. The survey as claimed by the appellee, although not corresponding with the courses and distances of the patent in every particular, is established as the true survey, not only by the surveyor, but by twelve or fifteen witnesses who have been familiar with the lines and courses of the patent for many years, and many of them deriving their information as to the true corner from those at the time in possession. Several of the corners of the patent are well established by the proof of the appellee and are in the survey as claimed by him. The preponderance of testimony is certainly in favor of the lines and corners as fixed by the red circles on the surveyor's report beginning at 1, and running to 2, 3, 4, 5, 6, and 7.

The rule of law is well settled that where the lines and corners correspond with the immovable and natural objects as fixed by the survey, the course and distances must yield, and on the contrary where the lines and courses have been effaced the courses in the patent must govern. *Dimmitt v. Lashbrook*, 2 Dana, 2.

Corner trees being proven to correspond with the calls of the patent is prima facie evidence that the survey was so located.

The judgment of the Court below is *affirmed*.

J. W. Seale, for appellant.

Thomas Murrell, for appellee.

EDWARD DONNELLY v. B. F. HILL, ETC.

Account, Action on—Bill of Particulars—Evidence—General Admissions.

The depositions of the witnesses who prove a general admission or rather not a specific denial of the account when the parties were endeavoring to make an amicable settlement, is not sufficient to dispense with a bill of particulars when it was demanded, and especially when the only item named constituted so insignificant a part of the claim.

APPEAL FROM MARION CIRCUIT COURT.

March 12, 1873.

OPINION BY JUDGE PETERS:

Appellees do not controvert the proposition that appellant was a partner in constructing the Lebanon and St. Rose turnpike road

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on the same terms that Donnelly and Bell were in constructing the Lebanon & Raywick turnpike road except as they contend the profits were to be equally divided between the three, Donnelly however contending that he was to have one-half the profits and Hill and McElroy jointly but a half of the profits.

Bell proves that by the terms of his contract with Donnelly he was to attend at the gravel bank and keep the hands there at their work, the terms of the two contracts therefore being the same except as to the division of the profits, Hill can not be entitled to compensation for services performed by him for the firm at the gravel bank, it is not pretended that Bell ever claimed, or was allowed compensation for like services. To entitle Hill, therefore, to compensation for services rendered by him there must have been a special agreement proved between him and the other members of the firm. And no such special agreement was proved. Indeed this is the general rule which prevails in general partnerships. *H. & P. Lee v. Lashbrook*, 8 Dana 214.

An account is presented by Hill with his petition, one of the charges of which is, "for various expenses for blacksmithing and other things they paid out \$1,363.31.

On the report of the Master an item of \$1,298.19 is credited to Hill for "Sundries acct." See Averitt & Russell's deposition. What composed the "various expenses" other than the blacksmithing, or the "Sundries" is not shown by the evidence. Hill professes to have an account of moneys expended by him for the firm and should, when called on, have furnished the items composing this large account. The deposition of the blacksmith was taken—he proved only \$65 of the account. The depositions of the witnesses who prove a general admission or rather not a specific denial of the account when the parties were endeavoring to make an amicable settlement is not sufficient to dispense with a bill of particulars when it was demanded, and especially when the only item named constituted so insignificant a part of the claim. We are not satisfied that there was any error in adjudging to the partners co-equal shares in the profits, and the evidence will not authorize this court to say that Hill should not be allowed something for keeping appellant's horses. But for the errors in allowing Hill \$500, for compensation "for services rendered the firm, and for failing to require him to itemize his account" for various expenses "black-

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smithing, etc.," and requiring proof of the items generally, the judgment is reversed and the cause is remanded for further proceedings consistent herewith.

W. B. Harrison, for appellant.

Hill, for appellees.

GEO. CARTER v. COMMONWEALTH.

Criminal Law—Theft—Declaration of Party Accused Competent Evidence.

The declarations of a party accused of theft as to the manner in which he may have acquired possession of the stolen property are always admissible in his behalf, where the guilt of the accused is made to turn alone upon such possession.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 12, 1872.

OPINION BY JUDGE LINDSAY:

The failure to object to the testimony of Garrison Jones precludes this Court from considering the question now raised for the first time as to the competency of the witness.

The only facts proven connecting the appellant with the taking and asportation of the stolen mare, are that he was in possession of and sold her after she had been stolen. The question presented by the exception to the refusal of the court to allow the witness, Len Carter, to state to the jury what the appellant said at the time of the sale as to the manner in which he acquired such possession, is the only one we deem it necessary to determine.

It is apparent from the record that appellant was not, at the time these statements were made, suspected of the theft. According to the doctrine established by the case of *Rex v. Abraham*, 2 Karrington & Kerwin, 550, which was approved by this Court in the case of *Tipper v. Comlth.*, 1st Metcalfe 6, this testimony was competent, and the avowal of appellant as to what the answer to the question would be, shows that it was material.

Without indicating an opinion as to whether or not under such circumstances the declarations of a party accused of theft as to the manner in which he may have acquired possession of the stolen

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property are always admissible in his behalf, we are of opinion that in this case where the guilt of the accused is made to turn alone upon such possession, the declarations in question ought to have been permitted to be proven to the jury. For the error of the court below in sustaining the objection to this testimony the judgment must be reversed.

The cause is remanded for a new trial upon principles consistent with this opinion.

Breckenridge, for appellant.

Buckner, for appellee.

COMMONWEALTH v. JAS L. BLAND.

Indictment and Information—Requisites and Sufficiency of Accusation:

First, An indictment is sufficient if it can be understood therefrom: That it was found by a grand jury of a county or city impaneled in a court having authority to receive it.

Second, That the offense was committed within the jurisdiction of the court and at some time prior to the finding of the indictment.

Third, That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction.

APPEAL FROM MASON CIRCUIT COURT.

June 4, 1872.

OPINION BY JUDGE LINDSAY:

An indictment is sufficient if it can be understood therefrom:

1st. That it was found by a grand jury of a county or city impaneled in a court having authority to receive it. * * *

2d. That the offense was committed within the jurisdiction of the court and at some time prior to the finding of the indictment.

3d. That the act or omission charged as the offense is stated with such a degree of certainty, as to enable the Court to pronounce judgment on conviction, according to the right of the case, Section 128, Criminal Code. Testing the indictment in this case by the rule thus prescribed by the Legislature it seems to us that it is sufficient.

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It is direct and certain as to the offense charged. No one can mistake the statute under which it was found.

The charge that the defendant had been guilty of "carrying concealed a deadly weapon" was sufficient to apprise him of the nature of the accusation upon which he was to be tried, and a trial under the indictment would constitute a bar to any subsequent proceeding for the same offense. No greater degree of certainty than this is or ought to be required. *Commonwealth v. Perrigo*, 3d Metcalfe 5.

The defendant can not be convicted unless the offense is proved as charged, i. e., that he carried the deadly weapon concealed upon or about his person. The defect complained of, if it be one, does not tend to prejudice the substantial rights of the defendant. Sec. 129, Criminal Code.

The demurrer should have been overruled. Judgment reversed and cause remanded for further proper proceedings.

Attorney General, for appellant.

Phister, for appellee.

ALEXANDER SAYER v. T. W. SAMUEL, ETC.

Executions—Motion to Quash Not a Bar to a Proceeding in Equity to Enjoin Collection.

A motion to quash an execution may be made when an execution has been irregularly issued, when it has been issued against the wrong party, or upon a different judgment or upon a defective sale bond or by reason of some other defective proceeding.

A mere motion to quash an execution, the motion having been overruled and nothing else appearing in the record is not such a judgment as will bar a proceeding in equity to enjoin the collection of the executions upon the grounds of payment even if the relief asked for was one of the grounds set forth in the motion to quash.

APPEAL FROM NELSON CIRCUIT COURT.

January 3, 1872.

OPINION BY JUDGE PRYOR:

In May, 1866, Wheat & Co. had a venditioni exponas issued from the Clerk's office of the Nelson Circuit Court directing the

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sheriff of that county to sell certain personal property, and a tract of land, belonging to one J. McDoom and containing about 2,500 acres to satisfy a debt due the plaintiff therein.

At the same time a venditioni exponas also issued in favor of Joseph Hart against the same parties, and was placed in the sheriff's hands for the sale of the same property.

The sheriff proceeded to sell the land and the appellant Sayer became the purchaser for the sum of \$500.00, for which amount he executed bond with John G. Samuels, his surety.

The amount of the sale bond was apportioned between the two executions, and these executions afterwards paid off by T. W. Samuels, the sheriff, and endorsed for his benefit. Samuels, in November, 1869, had an execution issued on the sale bond against the appellant Sayer and placed in the hands of the (then) sheriff of Nelson county for collection. After this execution had been issued on the bond, the appellant Sayers, upon notice given to the appellee, moved the Judge of the Nelson Circuit Court to quash the execution, and assigned eight different grounds for sustaining his motion. Among the causes alleged were, that the appellee was not the owner of the bond, and also that the appellant had fully satisfied and paid the same to the appellee. The Court upon the hearing of this motion refused to quash the execution. Appellant then filed his petition in equity, and obtained an injunction enjoining the appellee from proceeding to collect the amount of the bond. The same grounds are relied on for obtaining the injunction that were made by the appellant on his motion to quash the execution.

The appellee answered the petition in which he controverts all the material allegations and insists that the proceeding by motion to quash the execution is a bar to the relief asked for by the appellant in the present action.

A motion to quash an execution may be made when an execution has irregularly issued, as for instance, where it has been issued for or against the wrong party, or upon a different judgment than the one in which the execution issued, or upon a defective sale bond, or by reason of some other defective proceeding. An execution may also be quashed upon proof of payment of the debt, but as a general rule the quashal of an execution presupposes the right of the party entitled to the execution to have it again issued. Whether the question of payment was considered by the Court

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upon the motion **does not appear, and we are not disposed** to adjudge that a mere motion to quash an execution, the motion having been overruled and nothing else appearing on the record, is such a judgment as will bar a proceeding in equity enjoining the collection of the execution upon the ground of payment even if the relief asked for was one of the grounds set forth in the motion to quash.

We are also well satisfied that the question of payment connected with the many transactions relating to the partnership between these parties was not investigated upon the motion to quash the execution and if such was **even the case the facts** in this record establish an indebtedness upon the part of the appellee more than sufficient to discharge the amount of the execution issued against the appellant, and he is therefore entitled to the relief asked for if the allegations of his petition are sustained by the proof.

When appellant purchased the land for which the bond was given, it was sold subject to a lien of near \$2,000.00, held on the same, in favor of a man by the name of W. H. Doom. The land was afterwards sold to satisfy this lien as well as the lien acquired by the appellant under his purchase. It seem that the appellant and one W. I. Samuels were the ostensible purchasers of the land under this sale. W. I. Samuels was a son of the appellee, and as the appellee was the commissioner who sold the land, it was thought proper that the title should be vested in the son, so as not to invalidate the sale. This land had valuable timber on it, and of a character that suited the partnership business of the appellant and the appellee. The appellant and the appellee from the last purchase, took possession of it, and used it, the appellee assuming as much control over it as the appellant. The land was given in to the assessor of taxable property, as the land of Samuels and Sayers, and when a compromise was effected between the two, the appellant took the land, the appellee was assigned his part of the staves, ties and other timber cut upon it. There is no doubt but that the land was the partnership land of Samuels and Sayers and the name of the son was used in the purchase merely to hold the title for the father. In 1866 the appellee paid off the execution, by which, as he alleges, the appellant became indebted to him in the amount of the sale bond. He never attempted to coerce this bond or its amount, until the two became hostile to each other some

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two or three years after, and then had his execution issued. The appellant shortly before and after the execution of the bond, had either loaned or paid to appellee various sums of money amounting in the aggregate to about twenty-five hundred dollars. The partnership then existed between them. The land for which this bond was given had again been sold and purchased for the benefit of the firm, and thereby converted into partnership property. The parties had used it as such, and never would have regarded the land in any other light but for the unfortunate difficulty that originated between them.

After they had divided their partnership, and a settlement had, at the instance of mutual friends, and each one required to make a statement of his demands against the other, no mention whatever was made of the amount of this bond. The result of this settlement shows the appellee indebted to appellant in a sum exceeding two thousand dollars. This was in 1869, nearly three years after the appellee had paid off the executions and become entitled to the proceeds of the sale bond. The appellee paid over in money on this settlement to the appellant nearly twenty-one hundred dollars, and what he lacked of money, required his relative to execute to the appellant his note for. Now, if the appellee held this claim against the appellant, in a condition where an execution could be issued for the money, and an objection as available to him as the bank bills he was paying out, why did he not present it, in part payment of his indebtedness on the settlement? The only satisfactory answer that can be given, is that it had become a part of the partnership liabilities, and in the transaction between the parties touching the partnership, and the payment of monies to the appellee it had been fully accounted for. It is true that the written evidence of the matters embraced in the settlement between the parties made in 1869 says, "that this settlement is not intended to nor does it include any matters between said Samuels and Sayers, growing out of or pertaining to any suits or judgments, or executions in the Nelson Circuit Court. Said matters are not affected by this settlement in any wise. Matters which rest upon judgment of court or are in court for adjudication are excepted, but all others are settled by the terms of this paper."

The proof in regard to this writing is, that the appellant had two suits pending in court, against the appellee, and that these

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suits were excepted from the settlement. This exception was talked of by all who attempted to aid in the settlement; they all knew what exceptions were made, and at no time was this five hundred dollar sale bond ever mentioned. An opportunity was offered the appellee when the settlement was made to insist upon his right to the amount of the bond, but it seems to have faded from his recollection entirely, and he now claims that the exception in the settlement itself shows that the bond was not included in the settlement. The friends of the parties were endeavoring to settle all the differences between them, and if you apply it to the partnership alone, then this whole land and its purchase formed a part of the partnership accounts and was embraced by it. The appellee acquired a right to this sale bond in 1866, he afterwards purchased through his son one-half of the land. The land when purchased belonged to him and the appellant. The appellant shortly before and after the purchase in 1866 let the appellee have sums of money, amounting to \$2,500.00. No claim is set up for this sale bond or its amount for near three years, a settlement is had between the two after the lapse of three years and the appellee pays to the appellant near two thousand dollars in money, and has a note executed to him for the balance of his indebtedness and all this time he insists that his sale bond with interest from 1866 was due and owing him.

We are satisfied that the amount of the sale bond was accounted for by the appellant, and if the written evidence of settlement is to be construed as contended for by appellee, the proof introduced shows clearly that its terms embraced more than was intended or agreed upon by the parties. The question as to what the writing does embrace is altogether immaterial however, for the reason that the claim of appellee is satisfied.

Wherefore, the judgment of the court below is reversed and the cause remanded with directions to the court below to make the injunction perpetual and for further proceedings not inconsistent with this opinion.

Muir & Wickliffe and Bullock, for appellant.

Johnson, for appellees.

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Reversal—Technical Error.

46. Where the evidence preponderates in favor of the finding of the jury, the Court of Appeals will not reverse for a mere technical or verbal error. *Spradling, Ex'r, v. Coyzens*.....282

Reversal—Insufficiency of Petition.

47. If a plaintiff fails to state a cause of action, it is not too late, in the progress of the trial, at any time to demur, or to move for nonsuit, or in arrest of judgment, and where a plaintiff has recovered judgment below and has failed to state facts sufficient to constitute a cause of action the Court of Appeals will reverse the judgment. *Barber v. Moore*192

Reversal—Conclusions Against Evidence.

48. Where the law and facts are submitted to the circuit judge, the Court of Appeals will not reverse unless the conclusion of the court is flagrantly against the evidence. *Bowman v. People's Ex'r*.....189

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APPEAL—Continued.**Reversal—Right to Demand.**

49. An appellant has no right to demand a reversal of a judgment against him because of the fact that it must be reversed as to another appellant. *Hamilton v. Barnes*.....167

Reversal—Oral Instructions.

50. The Court of Appeals will not reverse on account of oral instructions where neither side objects. *Shotwell v. Yelton*.....148

Reversal—Unwarranted Verdict.

51. A judgment may be reversed on the sole grounds that the verdict of the jury ought not to have been sustained by the court. *Chrany v. Hicks*.....73

Reversal—Amount in Controversy.

52. Where the only error is in the adjudged balance of \$29.00, and as the accumulated cost on each side would necessarily exceed the amount in controversy this court will not reverse the case. *Beckwith v. Lambert*.....77

Law of Case.

53. On the second appeal the law as expounded on the first must prevail as to the questions involved. *Guthrie's Ex's v. Stevens*....360

54. The former decision of the Court of Appeals must be regarded as final as to all questions involved in this controversy except such issues as are raised by the amended petition filed after the return of the case to the Chancery Court. *Howard v. McCollum*.....537

55. The Court of Appeals has not the power to revise its former decision, whether it be right or wrong, but such court as well as the Circuit Court, is bound to recognize it as the law of the case. *Abbott v. City of Newport*.....76

APPEARANCE.

Appearance by Appeal.—See Appeal 8.

Filing Affidavit Controverting Grounds of Attachment is General Appearance.—See Attachment 4.

ARMY AND NAVY.

Property Under Order of Superior Officer.—See War 2.

Property Taken by Government for Public Use.—See War 1.

Presumption.

The government, having paid the arrears to the widow, it must be presumed that she brought herself within the provisions of the law, although the fact that the payment has been made to her may not be conclusive as to her right to retain the money as against her husband's creditors, it at least makes out a prima facie case in her favor. *Cooper v. Cooper's Heirs & Creditors*.....212

[References are to Pages.]

ASSIGNMENTS.

Lien.

1. The assignee of a note is invested with the equitable right to avail himself of the benefits of any lien the assignor may have held to secure the payment thereof and a written transfer passes no greater interest in a mortgage or deed of trust by reason of its being mentioned in the writing, than it would have passed if it had been omitted. *Thornhill & Richardson v. Ford*.....262

Title Bond.

2. The assignment of a title bond by the vendee therein does not impose on him the responsibility of the vendor, but only that of an ordinary assignor. *Grady v. Bailey*.....644

Action Against Assignee.

3. An action can not be maintained against the assignee of a note, where he is free from fraud or deceit, until the estate of the maker is prosecuted to insolvency, and no proof short of that furnished by a judicial determination or a return of nulla bona will suffice. *Thornhill & Richardson v. Ford*.....262

Pleading.

3. In an action by an assignee against assignor the petition must allege that the obligor has been prosecuted to insolvency, when the execution was issued, the consideration paid for the note, that the assignor promised to be responsible if the maker proved insolvent, that the assignor represented to the assignee that the maker was solvent when the note was assigned. *Hampton v. Moss*.....69

4. Due diligence is a question of law, and in order that the law may pronounce its judgment, the facts must be stated, and an omission will not be supplied by a reference in the petition to the execution and return, but the facts, including the history of the case, from the assignment of the note to the suing out of the execution, must be stated, and a reference made to them and an offer to file them, "if necessary," does not make them a part of the petition. *Young v. Edwards*.....334

Jurisdiction.

5. Where the circuit and quarterly courts of the same county have concurrent jurisdiction, the assignee of a note must sue in the one holding its regular term first after the assignment. *Rogers, Adm'r, v. McHenry*255

Execution—Diligence.

6. In order to charge an assignor, suit must not only be brought, but it must appear that due diligence has been used in suing out an execution on the judgment, and an averment made at the time when and to the county to which it issued, and it is not sufficient to say that "an execution was duly issued on said judgment." *Young v. Edwards*334

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ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Lien by Creditor.

Before a lien has been acquired by a creditor a debtor may right-fully convey his property to all of his creditors, or to a trustee for their benefit and the non-acceptance of the trust by the trustee will not defeat the rights of the beneficiaries under the deed of assignment as the chancellor will appoint a trustee. *Smith & Walde v. Culbertson & Co.*160

ASSUMPTION.

Intention of Legislature to Revive Rights Barred.—See Limitation of Actions.

ATTACHMENT.

Basis of Remedy.

1. Before this extraordinary remedy is resorted to, the party obtaining it should have proof upon which to base his action, and the court, in hearing and determining such a question, ought to be well satisfied, from the testimony, of the existence of the fraud charged. *J. H. & J. W. White v. Bondurant*.....351

Property Subject to.

2. Property in the hands of an agent who has no notice of sale made prior to the levy of the attachment, is subject to the attachment as possession did not follow the sale. *Burton v. Wingate*.....37

Fraudulent Intent.

3. Efforts on the part of a debtor to have suits brought against him on paper on which the members of his wife's family are endorsers, and his desire to make a secret sale of his land, although without the desire to prefer a creditor, when connected with the other facts and circumstances proven, establishes the fraudulent intent in the sale and disposition of the property. *Wilson v. Stoner*746

Appearance.

4. The filing of the affidavit controverting the grounds of attachment has the legal effect of entering the appearance of the defendant for all purposes. *Hayner & Dunlevy v. Templeman*.....542

Interest Sold.

5. Where an attaching creditor places his attachment in the hands of the sheriff and has it leveled he acquires no legal right or title to the property; but it is a mere equity, and he can not sell more than his creditor's interest. *Mulligan v. Neeter*103

Lien of Attachment.

6. When an order of attachment is sued out and delivered to the sheriff a lien is thereby created on the property of the defendant, prior and superior to one subsequently issued, although the sheriff levies the last one first. *Rexinger v. Loeb & Bloom*.....301

7. Where several creditors attack the property of their common debtor, and one of them summons a third party as garnishee, he has a

[References are to Pages.]

ATTACHMENT—Continued.

prior lien on this debt, notwithstanding it was not mentioned in the judgment sustaining the attachments. *Ullman & Co. v. Cloyd*.....336

8. Where appellants had their attachment levied on the tract of land to which L. had the legal title, and L. obtained a deed for the land in controversy from his father for the consideration of six hundred dollars in hand paid and the further consideration that he would support his father, on the land, during his natural life, and the father had the deed canceled upon the allegation that the consideration had failed, and the appellants had obtained an attachment lien on the land previous to the filing of the petition for cancellation, Held, that the only lien which the father has upon the land is for his support during his life. *Prichard & Bolt v. Lewis*.....583

Right of Creditors.

9. A third party can not hold personal property against an attaching creditor, where the purchase price has not been paid, nor the possession delivered. *Morris v. Kimble*.....179

Sustaining Attachment.

10. An order of court authorizing the plaintiff to withdraw the proceeds of the attached property from the hands of the officers, is in effect to sustain the attachment, and is a final judgment so far as the order of attachment is concerned. *Rowsseau v. Sheckler*.....282

Payment of Proceeds to Plaintiff.

11. It is error to pay over to the plaintiff the proceeds of attached property without the execution of the bond required by Section 440 of the Civil Code. *Rowsseau v. Sheckler*.....282

Separate Judgment.

12. The judgment for a debt at one term does not preclude the court from rendering judgment against a garnishee, summoned at a subsequent term. *Ullman & Co. v. Cloyd*336

Claim by Third Party.

13. Where a third person claims the property attached and the question of ownership is referred to the master for proof and report, and the commissioner reported that some of the property attached belonged to a third party, which report was confirmed, it was error to adjudge that all the property attached be sold. *Hillerick v. Whitaker*481

Judgment Against Garnishee.

14. Where the allegations upon which judgment was rendered against the garnishee are to the effect that the garnishee has property, money, choses in action, and legal and equitable interest in property belonging to judgment defendant, in his hands, and under his control, more than sufficient to pay the debt sued for, if the garnishee had in his hands money sufficient to pay such debt, a judgment may be rendered against him, but he cannot be compelled to pay the judgment defendant's debt, and then convert property in his hands belonging to the judgment defendant into money for the purpose of reimbursing himself. *Rosseau & Craddock v. Mitchell*567

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ATTACHMENT—Continued.

Discharge—Presumption.

15. Where an attachment has been discharged by the circuit judge and reinstated by a judge of the Court of Appeals, it will be assumed that the discharge and reinstatement were made on the merits of the case, and such presumption is entitled to a controlling influence. *Shercliff v. Cooper & Jarboe*.....772

Bond—Action On.

16. In a suit upon a forthcoming bond for goods attached, the obligors are estopped from denying the admissions in the bond, as controverting their existence. *Garrett v. Philipps*.....624

17. If the attachment levied on the goods had the effect to prevent a sale or to injure appellee in his business or to impair his credit, it was proper and legitimate for him to show these facts, but the mere opinion of the witness that the levy of the attachment worked this injury upon appellee is incompetent; since the witness must state facts such as that his customers have abandoned him, or his credit had been impaired by the merchants refusing to credit him, in order that the jury may form their own opinion. *Brayton v. Spooner*.... 63

Pleading.

18. Where the petition fails to allege that the order of attachment under which appellant's property was seized had been discharged or in any way finally disposed of, no cause of action is set out. *Ultz v. Sams*702

ATTORNEY AND CLIENT.

Duty to Client.

1. Where an attorney was one of the original plaintiffs and his personal interest was antagonistic to that represented by an administrator, it was impossible for him to protect his individual interests and at the same time discharge his duty as counsel to the administrator. *Foxworthy's Heirs v. Trimble*.....659

Attorney's Lien.

2. Where a demand is not for the recovery of incidental damages, but for property, and a claim in money on which \$200 was paid on a compromise judgment, the appellee had a lien thereon for his fee as the plaintiff's attorney, of which the pendency of the suit was notice to the defendant. *Cord v. Glasscock*..... 7

3. An attorney has a lien on choses in action or other claims or demands put in his hands for collection which cannot be defeated by a compromise between the parties, and a purchaser takes the property subject to the attorney's lien for a reasonable fee. *Gunnell's Curator v. Luke*.....626

4. An attorney has a lien upon all choses in action, accounts or other claims or demands put in his hands for suit or collection and upon the judgment recovered, but he is not entitled to a lien where he represents a defendant in a suit to set aside a conveyance as

[References are to Pages.]

ATTORNEY AND CLIENT—Continued.

- fraudulent against creditors, where the judgment dismissed the action only. *J. W. Phelps & Co. v. Loving & Co.*.....271
- Compensation—Question for Jury.**
5. Where the employment of an attorney is fully proven, and he was to have a reasonable fee, it is for the jury alone to determine what the services are worth. *Rudd v. Welsinger*.....567
- Cessation of Relation—Limitation.**
6. The relation of attorney and client ceases upon the death of the latter, and the statute of limitations begins to run at that time. *Slack v. Rowlhac*101

AUCTIONS AND AUCTIONEERS.**Reformation of Deed.**

Where land is sold at public auction and it is announced by the auctioneer that it is sold subject to a dower interest, the purchaser has no right to have the deed reformed so as to contain a warranty of title, in order that he may recover thereon. *Mattingly's Administrator v. Graves*603

BAIL.**Taken by Clerk.**

1. After the accused has been committed and there has been a term of the circuit court, the clerk of that court, in the absence of the judge may take bail, and where there is a commitment by the court and the amount of bail is fixed the clerk may take the bail in the absence of the judge. *Spillman v. Commonwealth*.....134
2. Bail may be taken by the clerk of the Circuit Court in cases in which the accused has been committed to jail by the Circuit Court, and then only after the term has expired and in the absence of the judge. *Commonwealth v. Taylor*.....200
3. The clerk of the Circuit Court has no authority to take bail in cases where the accused has not been in custody of the Circuit Court. *Commonwealth v. Taylor*200

Separate Bond for Each Case.

4. Where defendant was taken before an examining court, charged with four distinct offenses, and after investigation he was committed on all of them, and subsequently was admitted to bail by the county judge, a separate bond in each case shall be taken. *Dunning v. Commonwealth*173

Bail Bond in Surety.

5. Where a surety is indemnified against loss by reason of the forfeiture of a bail bond, he is entitled to recover against the indemnitor all the expenses incurred in the recapture of the defendant, including the amount of the reward paid to the parties apprehending and arresting the criminal. *Donahue v. Thomas*.....637

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BAIL—Continued.

Right to After Conviction.

6. Where, after appellant's case was reversed and before the mandate of the Court of Appeals was filed, the county judge admitted the defendant to bail which he forfeited, and this action was instituted against his bondsman for the purpose of collecting the amount on the bond, after conviction a defendant cannot be admitted to bail, and the county judge had no authority to admit the defendant to bail although the judgment against him had been reversed. The mandate should have been entered and the court rendering a judgment could alone discharge the prisoner from custody, the bond taken by the county judge being unauthorized and void. *Spillman v. Commonwealth*134

Surrender of Defendant—Proof.

7. In a proceeding upon the forfeiture of a bail bond, it may be shown, by parol evidence, if agreed to, that the defendant surrendered himself into the custody of the court at the next term after the forfeiture was entered and that the indictment was dismissed and the prisoner discharged, which order was not entered of record at the time, and such order may be entered nunc pro tunc. *Commonwealth v. Sheritt*743

BAILMENT.

Gratuitous Bailee—Liability.

Where property is placed by its owner in the hands of another person for his own accommodation, the bailee is not responsible to the bailor, unless loss occurs through his negligence. *Carter v. Hazelrigg's Adm'r*194

BANKRUPTCY.

Assignee.

1. An assignee of a debt in bankruptcy holds same for the benefit of all the creditors of the bankrupt. *Given, Watts & Co. v. Jerome, Watson & Co.*361

Discharge.

2. A discharge in bankruptcy will exonerate a bankrupt from the payment of all debts provable under the bankruptcy act. existing at the time he filed his petition, if properly pleaded. *Talbott v. Phillips & Scally*401

3. The discharge in bankruptcy of B. barred S.'s right of recovery against him, and as S. could not recover, he could not subject property in the hands of the assignee. *Sims v. Bennett*211

Waiver of Right of Action.

4. The appellant waived his right of action against the bank by taking up the check and assenting to the charge for the payment against him, as shown by his permitting his account with the bank, including the charge, to be balanced on his passbook without objection, and especially so as he acquiesced in the transaction for three years. *Northern Bank of Kentucky v. Scott*.....450

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BANKS AND BANKING.**Listing Bank Stock for Taxation.**—See **Taxation 2.****BILLS AND NOTES.****Consideration—Failure of.**

1. If the note in suit was not given in consideration of the sale note on T., but only for a promised loan of the money expected to be paid by T., which was never made, there was a failure of consideration, although defendant may have incurred a liability by laches in not collecting the note on T., but such negligence did not render the note of defendant obligatory if the anticipated consideration failed. *Gardner v. Greer*478

Capacity of Maker.

2. Where, after the death of a wife, the family physician discovered that the husband's mind was weakening from disease of the brain, resulting in almost entire loss of memory, that his former affections for his children no longer existed, that his grandchildren residing in his own home were neglected, and he declared that his children should not enjoy any part of his estate, and while in such condition he executed a note for a large sum, amounting to about half of his estate, and thereupon confessed judgment on a note, was held that at the time of confession of judgment on the note he was not in a condition of mind to understand and comprehend what he was doing and that hidden influences operated for the purpose of intensifying his hatred towards his grandchildren resulting in the execution of the note. *McNess v. Thompson*121

Joint and Several Liability.

3. Where a note is signed by the obligors as president and directors of a corporation, and in the body of the note the parties jointly and severally agree to pay the money, and there being nothing pointing to the funds of the corporation as the source from which the obligee was to derive his money, they are jointly and severally liable. *Youtsey v. Trap*426

Endorsees—Liability.

4. With the evidence equipoised, the fact that H. is the payee and his name is just where it would be on the bill as first endorser, becomes important and must assert an influence in determining the liability of the parties. *Jones v. Jones, Assignee*.....549

Endorsement or Guaranty—Presumption.

5. Where a party writes his name across the back of a note instead of signing it at the end, it will be presumed that he intended to become bound as an endorser or guarantor and not as a co-obligor, and in that case the payee has no cause of action against him until he has prosecuted the obligor to insolvency. *Beal v. Lampkins*196

Assignment and Transfer.

6. The terms assignment and transfer, when applied to contracts of sale of promissory notes, are used synonymously by the general public and also, in some instances, by the courts. *Wright v. Banks' Ex'r*...717

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BILLS AND NOTES—Continued.

Assignments Without Recourse—Presumption.

7. Failure to assign a note in writing raises the presumption that the sale was made without recourse. *Wright v. Banks' Ex'r*.....717

Release—Parol Evidence.

8. An obligor in a note may be released by parol evidence, and the fact may be established by parol evidence, but such evidence should be clear, satisfactory and to the point, and if it does not come up to this standard it may be outweighed by the conduct and admissions of the party. *Page v. E. P. Neal & Co.*.....419

Corporation Note—Individual Liability.

9. Where there is no joint and severed obligation to pay, and the face of the instrument merely shows that the intention was to bind the company only, and the instrument points directly to the revenue of the corporation as the source from which the money is to be derived, there is no individual liability of the officers whose names appear on the instrument. *Youtsey v. Trap*426

Signature—Proof Of.

10. It is error, on the trial of an issue of non est factum, to permit the plaintiff, against the objections of the defendant, to prove certain papers produced by the witness to have been executed by the defendant, and to submit them to the jury, to prove by comparison, that the note sued on was signed by the defendant. *Jones v. Barber*.....482

Burden of Proof.

11. Where there is a plea of no consideration, in a suit on a note, the onus is on the defendant to establish by proof that fact. *Foreman v. Hope Ins. Co.*181

Merger—Presumption.

12. Upon the execution of a note the law presumes that all previous outstanding indebtedness was settled by that transaction. *Godsey v. Godsey*627

Refunding of Excess—Assignment.

13. Where a note already due, with several payments credited thereon, is assigned and by mistake or fraud in the calculation of the credits and interest, and the assignor is made to believe that there was only a balance of three hundred and thirty dollars due thereon, when in fact there was at the time six hundred and ninety-three dollars due, a court of equity will compel the assignee to refund to the assignor the amount in excess of the sum supposed to be due when the note was assigned. *Hopkins v. Catlett*.....506

Preferred Lien.

14. Where one takes the last note with notice of an agreement between the parties that a certain purchase money note was to have a preferred lien over the remaining part of the unpaid purchase price, he cannot complain that the preferred lien was adjudged prior to his. *Hazelrigg v. Trimble*526

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BILLS AND NOTES—Continued.**Unpaid Balance—Presumption**

15. The possession of the note sued on is strong presumptive evidence that the alleged balance has not been paid, and the execution of another note after the date of the one sued on strengthens this presumption. *Kendrick v. Lee*.....551

Satisfaction—Prima Facie Evidence.

16. Possession of a note by the maker if sufficiently proven is prima facie evidence of satisfaction and surrender in the absence of other evidence to explain the possession. *Shrader v. Lewis*790

Clerical Error—Collection.

17. The misdescription of a note is not sufficient to authorize a reversal of the case, and an error in the calculation of the interest at the time of the judgment is a clerical misprision which can be corrected on motion. *Rosseau & Craddock v. Mitchell*567

Pleading.

18. If the payee of a bill intends to hold the drawer responsible for the amount on the grounds of want of funds in the hands of the drawee, such fact must be averred in the petition, and it must be further averred that the drawee had notice of the protest. *Baurd v. Claney*223

—Exhibit.

19. In an action on a promissory note the writing should be referred to and filed with the petition, but failure to do so is not ground of demurrer, the appropriate remedy being by rule to compel the production of the note. *Brckett v. Adams* 71

—Answer.

20. Inasmuch as the original answer failed to state that the discovery that the representations were false and fraudulent, was not made until after the execution of the note, it was not sufficient. *Gayle v. Elam*694

Evidence.

21. Where appellee filed the note with his petition, with the assignment endorsed thereon, this was evidence sufficient to authorize the rendition of the judgment against the appellant. *Holt v. McGrew*348

Prima Facie Evidence.

22. Filing the evidence of a debt a note, with the petition, without the assignment of the payee therein by the plaintiff, he having the possession and making the averment that he was the owner is prima facie evidence of his right to the debt, and puts the onus on the defendant, if he questions the right of the plaintiff, and the evidence of the debt being filed becomes a part of the record. *Allen v. Randle & Tyler*215

Judgment.

23. Where joint obligors are sued on a note, a judgment against one of them does not prevent a judgment against the other at a subse-

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BILLS AND NOTES—Continued.

quent term, although both were served with process at the same time.
Ullman & Co. v. Cloyd336

BONDS.

By Purchaser of Equity of Redemption—See Execution 14.

BOUNDARIES.

Processioner a Civil Officer—See Grand Jury.

Corners.

1. Corner trees which are proven to the calls of a patent are prima facie evidence that the survey was so located. Seale v. Brandenburg.791

Courses.

2. Where the last line of the lot according to the calls of the deed must run with the line of P. street, which is known and recognized by the parties, and is made the southern boundary of the lot, that being an established line, the courses in the deed must be made to conform to that line. Hargraves v. Pope549

Boundary Line.

3. A compromise line established by remote vendors was held to be binding upon a feme covert and her infant children. McGuiar v. Neely601

Courses and Distances.

4. Where the lines and corners correspond with the immovable and natural objects as fixed by the survey, the courses and distances must yield, and on the contrary. when the lines and courses have been ef- faced courses in the patent govern. Seale v. Brandenburg.....791

Courses and Objects.

5. Where the degrees or courses in a deed differ from the natural or artificial object designating the boundary, the courses must yield to it. Winscott v. Bricken's Ex'r733

BROKERS.

Authority of.

1. A broker is a mere negotiator between other parties and never acts in his own name, but in the name of those who employ him, he is intrusted with the custody or possession of the goods; he is employed to sell and is not authorized to buy and sell in his own name. James Graham & Co. v. Duckwall, Fitch & Co.....495

Liability for Loss.

2. Where under a contract the appellants did not have the right to accept and reject orders from appellee at pleasure, and his margin was sufficient to authorize the purchase of stocks on his order and the refusal of appellants to buy stocks for the appellee resulted in a loss to him of \$7,000. such loss was the direct and immediate consequence of a plain and palpable violation by appellants of their contract with appellee, and they are responsible for the loss. J. B. Alexander & Co. v. Cain176

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BURDEN OF PROOF.

As to Alteration of Instrument—See Alteration of Instruments.
 In Action on Note—See Bills and Notes 22.
 No Consideration—See Bills and Notes 11.
 On Grantor to Show that the Property was Separate Estate—See Mortgages 3.
 Right to Make Service on Agent—See Process 4.
 Show that Land is not Within Exceptions to Deed—See Ejectment 10.
 To Rebut Presumption Arising from Execution and Acceptance of Papers in Settlement of Accounts—See Accounts 5.

CANCELLATION OF INSTRUMENTS.

Cancellation of Deed—See Execution 21.
 Equitable Remedy.

1. A rescission of the contract to sell land can not be had in an action at law, the remedy being by suit in equity. *Fennessey v. Abbott* 42

Executory Contract—Dissolution.

2. A chancellor will never dissolve even an executory contract at the instance of a complainant seeking a dissolution on the ground of a defect in or incumbrance on the title, if the incumbrance be removed and the title rendered perfect before the hearing, especially if there be no fraud on the part of the vendor by which injury accrues to the vendee. *Graham v. Majors & Tobin* 473

Pleading—Relief.

3. Where there is no prayer in the pleadings for a specific execution of the contract of purchase, but a prayer for a rescission, that is all the relief that can be afforded. *Hagarty v. Scott*..... 53

Party to Action.

4. Where a will vested the title to all testator's real estate in the executors, they have the power in the exercise of their discretion to sell and convey, and they also have the power out of court to rescind the contract of sale and the widow and heirs are not necessary parties. *Harris v. Field's Ex'tx.*..... 559

CARRIERS.

Pleading.

Where it is not alleged that at the time the freight was demanded and paid that appellants did not know that the sums demanded were more than by the terms of the contract appellees were entitled to receive, consequently the payments were neither made by mistake nor by the deceit of appellees, but with a full knowledge of all the facts, the petition does not state a cause of action. *Brandies & Crawford v. Lewis* 155

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CEMETERIES.

Removal of Tombstones.

Where one knew a graveyard was on the land when he purchased it, the law, without any reservation and inhibition in the deed, prohibits him from removing the gravestones, or injuring and removing the inclosure around the graveyard, and compels him to permit the relatives of those buried there to exercise the right of ingress and egress. *Hutchison v. Akin*.....373

CHAMPERTY AND MAINTENANCE.

Actual Possession.

A purchase of land was not champertous because the vendor did not have actual possession of the land at the time the conveyance was made. *Emerine & Wife v. Adams*..... 83

CLERKS OF COURTS.

Compensation.

Where a record is much confused by the interlineation of the orders out of their proper place, and without any regard to the order in which the proceedings were had, the clerk is not entitled to charge any fee therefor. *Seldon v. Bullitt*.....129

COLLATERAL ATTACK.

Judgment—See Fraud, 2.

Sale of Infant's Land. See Infants, 6.

COMPROMISE AND SETTLEMENT.

Memorandum of Partnership—See Partnership, 6.

Conflicting Claim—Mistake.

1. Where parties have conflicting claims to land and a lawsuit likely to arise to test the superiority of the one or the other, to avoid that conflict the parties may enter into an agreement to compromise, and should one of the parties by mistake of law arising on the facts be induced to enter into the compromise, such mistake is not a cause to set aside the compromise, nor will the court undertake, in such a case, to investigate the merits of the claim or to determine whether it was of sufficient importance to form a consideration for a compromise. *Bruner v. Berry*.....158

Question for Jury.

2. The question as to whether or not the writing purporting to compromise the action was executed under such circumstances as to render it of no binding force was properly submitted to the jury. *Hart v. Smithson*470

CONTINUANCE.

Discretion of Court.

1. The court does not abuse a sound discretion in overruling a motion for continuance, where the same order had been repeatedly moved

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CONTINUANCE—Continued.

by the same party who had shown no diligence in procuring a copy of their discharge in bankruptcy, especially where there was a rule to try. *Hamilton v. Barnes*.....167

Surprise.

2. It is not sufficient to authorize a continuance, where an amended petition is filed, for the party to state that he is surprised by the amendment, since the facts should be presented in the form of an affidavit or in the bill of exceptions, which would show that the defendant could not be ready for trial at that time. *Swift's Iron & Steel Works v. Dye*.....261

Affidavit as Evidence.

3. It is not error to refuse a continuance whereby agreement of the parties the affidavit filed in support of a motion for a continuance is permitted to be read as evidence in the cause. *Rudd v. Welsinger*..567

CONTRACTOR.

Failure to Complete House—Compensation.—See *Contracts* 8.

CONTRACTS.**Capacity to Contract.**

1. Where appellee had taken one or two drams the morning the contract was made, and although the lawyer who wrote the contract of sale, and others who saw him that morning did not discover that he was under the influence of liquor or incapacitated to make such a trade, still there was no doubt but what he was still laboring under the effects of his debauch and was in such a condition of mind as to be entirely reckless, not only in regard to his estate, but to every sense of moral duty, the bargain was unconscionable. *Donahoo v. Grigsby*631

Consideration—Fraud.

2. If a fraudulent contract be performed in whole or in part, and the other parties ratify and confirm it by receiving and enjoying the money or property received under it, and by suit recover and collect in addition thereto such damages as they may have sustained by reason of the fraud of their adversaries, every principle of justice demands that the latter should have a right of action against them for at least that portion of the consideration actually paid. *Gless v. Snooks*364

Consideration—Release from Imprisonment.

3. The arrest and imprisonment being unlawful, the contract to pay appellant for services to be rendered to effect the appellee's release was not unlawful or against the policy of the law, nor was it without consideration. *Munday v. Leathers*455

Consideration—Confederate Money.

4. The admitted receipt of the defendant for one hundred dollars in Confederate money to go as a credit on notes which the defendant

[References are to Pages.]

CONTRACTS—Continued.

held on plaintiff, imports a contract and was obligatory, unless the consideration was illegal or the execution of the receipt was procured by duress. *Smith v. Scott*.....438

Delivery—Presumption.

5. The fact that the writing is in the possession of the appellees raises the legal presumption that it was delivered to them by the parties that did sign it, and it was, therefore, incumbent upon them to rebut this presumption or to establish that appellees undertook to procure the signatures of all the parties mentioned in the body of the writing. *German v. Muldoom & Bullitt & Co*.....485

Description of Parties.

6. Although appellants are described in the contract as a committee, their undertaking to pay the agreed price for the monument is personal in its character. *German v. Muldoom & Bullitt & Co*....485

Restraint of Trade.

7. A contract to refrain from selling liquor by retail for one year is not against public policy. *Ewing & Patterson v. Winfrey*.....741

Contractor—Compensation.

8. Where a contractor fails to complete a house his compensation therefor should be the actual value of the house to the owner in its incomplete condition. *Smith v. Dressman*.....129

Collateral—Parol Agreement.

9. A collateral parol agreement for indulgence not entirely consistent with the writing is not enforceable against the written evidence of the contract. *Dewit v. Redwiltz*.....159

Quantum Meruit.

10. Where one undertakes, for a consideration paid or to be paid by another, to perform work and labor, or to fulfill a contract by the performance of services, and before the contract is completed abandons the work, he is entitled to recover upon a quantum meruit the value of his labor performed, less the amount of damages the other party has sustained by reason of his failure to comply with the contract. *Lee v. Davis*.....617

11. A party violating a contract may assert his claim for services, not upon the contract, but upon the implied promise to pay what his services were reasonably worth. *Lee v. Davis*.....617

Right to Possession of Property.

12. Appellant had such an interest in the profits in the stock of goods on hand, to the amount of one-half of the net profits, if he performed his part of the contract fully by selling them out, which he had partly performed, as to entitle him to possession for the purpose of completing his part of the contract. *Goode's Adm'r v. Blackwell*.692

Limitation.

13. The allegation of the petition as to the date of the contract will be regarded as the correct date in considering the question of limitation. *Hank v. Hank*.....479

[References are to Pages.]

CONTRACTS—Continued.**Instruction.**

14. Where appellee alleges in his petition that the stage of the water in the river was such that the coal contracted for could have been delivered after the first of October, 1867, and before the first day of March, 1868, but does not designate the earliest date at which delivery could have reasonably been made, and that the count had been taken as confessed, he would have been entitled under it to no more than nominal damages, the court properly refused to instruct the jury that appellants were not bound to deliver the coal mentioned in the contract until a reasonable time "after there were such rises in the Ohio and Kentucky rivers as enabled the defendants to send it in the usual way from Pittsburg to Frankfort." *McCreedy v. Scott*.....440

CONTRIBUTION.

Between Devisee and Creditor.—See Wills 30.

CORPORATIONS.

Appeal by Stockholders—See Appeal, 4.

By stockholders of corporation from judgment against corporation—See Appeal, 4.

Stockholder—Liability.

1. Where appellant took two shares of stock, but at the time the subscription was made no act of incorporation had been obtained, and shortly thereafter application was made to the legislature and an act incorporating the company was obtained, but under a different name from that set forth in the subscription paper, the legal effect of the obligation being to pay so much money to construction of a particular turnpike road, the change of the name of the company, whether by a vote of the directors or by an act of the legislature, does not alter appellant's liability. *Tully v. Cane Run & Kingsmill Tpk. Rd. Co.*...330

2. Where the act of incorporation enlarges the legal liability of the stockholders, and assumes liabilities that, by the express terms of the subscription, were prohibited, a subscriber will be released of his obligation. *Tully v. Cane Run & Kingsmill Tpk. Rd. Co.*.....330

Power to Borrow Money.

3. Where, by the provisions of the charter, the directors were authorized to borrow money to pay losses, they may not borrow from the stock fund of the company instead of going into the money market. *Merhoff v. Hope Ins. Co.*.....110

Action.

4. An action for a corporate liability lies against the corporation, and not against the stockholders of the corporation. *Ray v. Knowles*569

[References are to Pages.]

COSTS.**In Suit by Administrator—See Executors and Administrators, 17.****When Plaintiff Not Entitled to.**

- 1. Plaintiff is not entitled to costs where at the time the suit was brought he had no cause of action. *Butts v. Hazelrigg*.....221

Liability of Each Party.

- 2. Where the proceedings are vexatious upon the part of both litigants, and neither succeeds, each party should pay his own cost. *Higgins v. Stoy*352

Payment As Condition to Amendment.

- 3. Where the allegations of a petition do not state a cause of action the plaintiff should be required to pay all the cost, on reversal of the case, before he should be allowed to amend. *Oldham v. Price*....95

COUNTIES.**County Court—Submitting Question of Subscription.**

The county court has the right of its own motion to submit the question of subscription by the county to the capital stock of a railroad company and the voters of the county, and where the election is held in pursuance to the provision of the act of incorporation, it cannot be treated as void by reason of assurances or representations made to the voters by friends of the enterprise. *Presiding Judge of Washington County Court v. Cumberland & O. R. Co.*.....519

COURT COMMISSIONERS.**Commissioner Acting as Trustee for Debtor in the Sale of Property—See Judicial Sales 6.****When Not Entitled to Compensation—See Judges 1.****Duty Of.**

- 1. It was the duty of the commissioner to let out the work on a road and to receive it when completed, but they had no power to order the sheriff to pay the contractor. *Adams v. Brown*32

Report.

- 2. The mere report of a commissioner of a verbal expression of a desire on the part of appellants could not have the effect of binding them as by an agreement of record unless the report distinctly showed the terms of the agreement. *Ashurst v. Kern's Adm'r*.....29

Review of Court.

- 3. Where no appeal is taken from an order confirming a master commissioner's report of sale, the Court of Appeals will not review the action of the lower court in that particular. *Patrick v. Bohannon*259

Sale of Property.

- 4. The Master Commissioner will not sell more property than will be sufficient to pay the debts, and if upon the coming in of his report it shall appear that the taxes are not due, the amount thereof will

[References are to Pages.]

COURT COMMISSIONERS—Continued.

be paid to the appellant, if not needed to pay creditors. *Steadman v. Oldham*279

Report.

5. It is proper for the master commissioner to adopt the settlement made by the partners while both are living, as a basis of his report in settling the partnership account in a suit to settle the estate of a deceased partner. *Willis v. Rainey's Adm'r.*.....714

COURT PROCEEDINGS.

How Proven—See Courts 6.

COURTS.

Special Judge of Police Court—See Judges 2.

Statutes in Derogation of Power of Courts—See Statutes 1.

Decisions—Power Over.

1. The Court of Appeals has no power over its former decisions, and whether right or wrong, that court as well as the circuit court, is bound to recognize it as the law of the case. *Abbott v. City of Newport*23

Overruling Former Decision.

2. Where at the time legal tender notes were paid in satisfaction of a judgment, the decision of the Supreme Court of the United States was recorded as settling the rights of creditors to demand the payment of debts created to the passage of the legal tender act in coin, and the judgment defendant voluntarily paid off the judgment in treasury notes at their negotiable value as compared with gold, and the Supreme Court of the United States afterwards overruled the decision above referred to and held that treasury notes should be recorded as a legal tender for all debts, the overruling decision cannot have the effect of reopening the transaction. *Terrell v. Wathen*697

Jurisdiction.

3. The payment of the fifty dollars on the debt should first be applied to the discharge of the accrued interest; this being done, the balance remaining when credited on the principal did not reduce the amount due to fifty dollars, and the circuit court had jurisdiction. *Rake v. Hill*570

Jurisdiction—Presumption.

4. In the absence of a plea to the jurisdiction, it will be presumed that the party objecting resides in the county where the suit is instituted. *Foreman v. Hope Ins. Co.*.....181

Officer—Lien for Fees.

5. The officers of a court are not entitled to a lien on the subject-matter in litigation for their fees, since their fees are against the parties, and are merely personal in their nature. *Gunnell's Curator v. Luke*626

[References are to Pages.]

COURTS—Continued.

Proceedings—Proof.

6. The proceeding of the Court of Appeals can only be proved by a properly attested copy of its records. *Green v. Davis*.....660

COVENANTS.

Covenants in Deeds—See Deeds 2.

Breach Of.

To constitute a breach of the covenant of general warranty there must be an eviction of the grantee by paramount title, but the covenant of seizin is broken at once if the title conveyed is not clear, free and unencumbered. *Fennessey v. Abbott*42

CRIMINAL LAW.

Instruction.

1. An instruction not embraced in the bill of exceptions will not be considered by the Court of Appeals. *Sullivan v. Commonwealth*..120

Presumption of Order to Take Charge of Prisoner.

2. Where the record does not show that any order was made directing the sheriff to take charge of the prisoner, presumption thereof may arise from the acts of the judge. *Commonwealth v. Lewis*..249

Indictment—Demurrer.

3. Where more than one offense is charged in an indictment, except as provided for in § 126, Cr. Code, a demurrer is proper. *Smith v. Commonwealth*260

Evidence—Tracks.

4. It is competent for the commonwealth to prove the size of the tracks found, the size of the boots worn by the accused, and any fact which tended to show the correspondence in the size between the tracks and the boots, and it was for the jury to determine the value of such proof when made. *Babbitt v. Commonwealth of Ky*..522

Dying Declaration.

5. A written statement, made out and signed by parties other than the deceased, when not shown to have been read to the deceased and adopted by him as his version of the tragedy, is not competent as a dying declaration. *Babbitt v. Commonwealth*522

6. Dying declarations may be established by oral evidence. *Babbitt v. Commonwealth*522

Conviction—Testimony of Accomplice.

7. A conviction cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense and the corroboration is not sufficient if it merely shows the offense was committed and the circumstances thereof. *Young v. Commonwealth*711

Instructions—Imminent Danger.

8. It was for the jury and not the court to determine whether or not, when considered in connection with all the evidence in the case,

[References are to Pages.]

CRIMINAL LAW—Continued.

the facts justified the conclusion that the accused at the time of the killing believed and had reasonable grounds to believe that he was then in imminent danger of losing his life or suffering great bodily harm at the hands of the deceased. *Carter v. Commonwealth*.....777

CROSS-EXAMINATION.

Production of Witness For—See Witnesses 4.

DAMAGES.**Injury to Property.**

1. The jury should have found for the appellant the value of the horse, unless it was killed by appellees in repelling an assault made on them by him, which could not have been successfully resisted by the use of less force than was resorted to by them. *Evans v. Littell*650

Punitive Damages.

2. Where plaintiff willingly engaged in a combat, he cannot recover vindictive damages in an action therefor. *Evans v. Littell*650

Measure Of.

3. Where the jury were told that, in assessing damages, they may find in any amount which in the exercise of a sound discretion they may think the plaintiff is entitled to, the latter part of the instruction is not objectionable, but when taken in connection with the preceding part, it conveys the idea that they have the right to find other than actual damages, and is erroneous. *McQuire v. Lorian*145

Excessive.

4. Where the amount of damages assessed indicates that the jury must have acted under the influence of passion or prejudice, and such fact was recognized by the appellee, and upon the suggestion of the court, consented that a judgment should be entered for two-fifths of the damages assessed. When it appears that the jury were influenced by passion or prejudice in the assessment of damages, it may readily be concluded that the same cause influenced them in determining whether or not the appellee was entitled to recover at all. *Abbott v. Lewis*230

DEEDS.**Capacity to Convey.**

1. Where, in the year 1867, R. made her last will and testament, by which she devised all of the estate to her two children, A. and C., for life, with remainder to their children, and on the 16th day of April, 1869, the deviser executed a deed to her son, A. R., one of the appellants, by which she conveyed all of the property devised to C. to him, in trust for his children; and for months previous, and about the date of this deed, her many neighbors, who had known her for many years, testified that her mental faculties were much impaired, and to such an extent, in the opinion of many, as to render her incapable of

[References are to Pages.]

DEEDS—Continued.

executing such an instrument, and she was then residing with her son, A. R., the deed should be canceled. *Rent v. Cox*.....403

Covenants.

2. A deed contains two distinct covenants, the first a covenant of seizin, and the other an ordinary covenant of general warranty. *Fennessey v. Abbott*42

Fraud.

3. Where appellant neither alleged nor proved that his acceptance of the deed and warranty was induced by fraud, nor that insolvency or non-residence rendered the covenant of warranty unavailable, nor that any breach of the warranty had occurred by eviction, appellant was entitled to no relief, unless upon the grounds of fraud superinducing the contract. *Henning v. Henning*20

Imperfect Title—Recovery.

4. Where the title is perfect to one-half of the property conveyed, and defective as to the other, the criterion of recovery is one-half of the original consideration with interest. *Fennessey v. Abbott*..42

Notice.

5. Where a deed contains the provision that no sale of the land shall be made without the consent of the grantor, it is notice to the world of the reservations and conditions therein made. *Cummins v. Whaley's Adm'r*.....246

Constructive Notice—Bona Fide Purchaser.

6. Constructive notice arising from the recording of a voluntary conveyance is not sufficient to effect the conscience of a bona fide purchaser, actual notice being necessary for this purpose. *Garrett's Heirs v. Powell*486

Evidence.

7. The recitals in a deed, although evidence as between the parties hereto, are not evidence as against those who are not parties or privies. *Tuck v. Ogburn*326

DELIVERY.

Delivery Of—See Sales 1.

DEPOSITIONS.**Right to Take and Read.**

1. The fact that one party demands the personal attendance of a witness does not prevent the other from taking the deposition of such witness and reading it on the trial of the cause, provided the party demanding the presence of the witness goes to trial without it. *Johnson v. Mullen's Assignee*561

Use in Another Cause.

2. In courts of chancery the depositions of witnesses taken in one cause are frequently read as evidence in another, where the parties are the same, but they are never admissible as evidence, even between

[References are to Pages.]

DEPOSITIONS—Continued.

the same parties, unless the same matters were in issue in the former cause that are involved in the subsequent one. *W. C. Whitaker & Co. v. Elijah Alnut & Co.*.....342

DESCENT AND DISTRIBUTION.**Rights of General Devisees.**

1. The rights of general devisees are subservient to the rights of those to whom property has been specifically devised, with respect to the payment of the debts of the testator. *Blanchard v. Herbert.*.....8

Estoppel of Devisees.

2. Devisees can not claim the estate devised to them in the balance of the tract of land and deny the right of the testator to dispose of the rest, and thereby defeat the interests therein intended to be secured to their children. *Fentress v. Holmes*21

Improvements.

3. Where an intestate had placed several of his children in the possession of parcels of his land and gave them some personal property, intending that this property be held and owned by them and to be accounted for in the final disposition of his estate between all of his children, but failed to execute any kind of writing evidencing the advancements in such a way as to pass title to the land, the appellants refusal to execute deeds in order to perfect the title to the real estate given by parol to some of the children, resulted in annulling these gifts, and the parties in possession must account for the rents, and be credited with the permanent improvements made by them on the property. *Cummins v. Bradford*78

Administrator—Liability.

4. Where the children of deceased sued the administrator de bonis non for settlement of the estate, and the trial court charged the administrator with all moneys and property which passed to the prior deceased administrator, and rendered a personal judgment against him for the whole amount, it was held that as there was no devastavit and no effort to have a settlement until suit was brought, the judgment should have been against the administrator as the administrator of his deceased father, to be levied of assets in his hands as such. *Smith v. Norris' Heirs*142

Liability of Devisees.

5. Heirs or devisees may be sued by a creditor for any liability of the decedent, and the failure to make a demand is not an available ground for dismissing such an action. *Peay's Adm'r v. Winter's Heirs*419

Forfeiture of Right by Devisee.

6. Where a condition is annexed to a devise, a failure by the devisee to comply with it will work a forfeiture to his right to claim the property so bequeathed. *Wallace v. Wallace*400

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DESCENT AND DISTRIBUTION—Continued.

Descent on Death of Child.

7. Where an infant dies, having derived title to real estate, by descent from its father, the mother acquired no right or title to such land, but the same passes by descent to the next of kin on the father's side, however the widow has her dower therein. *Thomas v. Miller & Wife*349

Advancement or Debt.

8. In the distribution of a decedent's estate it is immaterial whether the amount charged against a child was regarded as an advancement or a debt. *Secrest v. Sandford*142

Advancements.

9. Where a will provides: "All the money or property that is charged by me to each one of my children in a book kept by me for that purpose is to go and be counted as a part of my estate received by them and as a part of a share thereof to which they are entitled under this will as well as that now charged or that I may hereafter charge any of them with," the advancements made to the daughters should be charged to their children, as it is evidence that testator did not mean to charge his sons with advancements and except his daughters therefrom, and the term "money or property," as used by the testator, included the rents charged against such of his children as were occupying portions of his lands. *Eaton v. Redman*782

10. The fact that the father kept an account of advancements and failed to charge his daughter with this sum of money for property he had let her husband have, is conclusive that it was not given to the daughter but sold to the husband, and she should not be made to account for it. *Lane's Heirs v. Shearer*613

11. Although the grandfather of appellant saw proper to charge his granddaughter as an advancement, with a tract of land which he conveyed to her husband, yet since the conveyance to the husband was unconditional, and there being no agreement on the part of the husband to hold the land for the benefit of his wife, the land can not be charged to her as an advancement. *Johnson v. Leach's Adm'r*....528

Advancement—Dower.

12. Where the decedent advanced to his daughters a tract of land each in which the widow claims dower, in the settlement of the estate the value of the dower should be deducted from the price of the land with which the daughters are charged as an advancement. *Lane's Heirs v. Shearer*613

Descent of Capital Stock.

13. The capital stock in a railroad corporation is realty and descends to the heirs at law of the original owner, and they are entitled to hold same and enjoy the profits, in the way of dividends, arising from such estate as against the personal representatives. *Maroman's Adm'r v. Bunting*599

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DIRECTION OF VERDICT.**When Should Not Be Made—See Trial 7.****DISCRETION OF COURT.****Amendment of Pleading During Trial—See Pleading 27.****As to Amendment of Pleading—See Pleading 20.****Dismissal of Action—See Dismissal and Nonsuit 2.****Granting License to Retail Liquor—See Intoxicating Liquors 1.****Overruling Motion for Continuance—See Continuance 1.****Refusal to Permit Amended Answer to be Filed—See Pleading 18.****DISMISSAL AND NON-SUIT.****Motion for Non-suit—When Made.**

1. A motion for non-suit is usually made immediately after the plaintiff has closed his evidence, on the grounds that the testimony fails to make out a cause of action against the defendant. *Towler v. Wilson*10

Discretion of Court.

2. In the exercise of a sound discretion a court may sustain a motion to dismiss without prejudice, but after the cause has been regularly heard and submitted to the court for its decision on the merits, the plaintiff cannot, as a matter of right, avoid the result of the trial by dismissing the cause without prejudice to another suit. *Helm v. Helm*532

Waiver of Order of Dismissal.

3. Where, notwithstanding an order dismissing the case, the parties acquiesced in the pendency of the litigation, the order will be treated as waived. *Noe v. Turner*452

DIVORCE.**Rejection of Divorced Wife as Witness for Husband—See Exceptions, Bill Of 7.****Separation.**

1. Five years' separation without cohabitation and the failure of the husband in that time to provide or attempt to provide a home for his family, leave no doubt that he has, at any time since the separation, in good faith contemplated the resumption of his marital relations with his wife, and make out a statutory ground of divorce. *Addison v. Addison*225

Allimony Pendente Lite.

2. The authority of the court to allow the wife allimony pendente lite should or should not be exercised according to the facts developed in each particular case. *Forster v. Forster*385

Allimony.

3. Where a wife, without reasonable cause, vountarily abandons her husband against his will, allimony should be refused her. *Forster v. Forster*385

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DIVORCE—Continued.

4. The allowance of alimony to the wife is only an adjudication of her right and does not relieve the husband of the obligation to provide necessaries for his infant children, and when such necessaries are furnished by another he is bound therefor. *Young v. Young*. 266

Decree—Annulment.

5. There is no mode of annulling a judgment for divorce except as prescribed by the Code of Practice, in which either party may file a petition for that purpose and the case is heard as other equitable actions. *Dial v. Dial*633

6. A judgment in a suit for divorce may be annulled by the court granting it at any time as prescribed by statute, but it must be done by petition of the parties as prescribed by the code. *Dial v. Dial*....633

Dower—Widow's Right of—Death of Infant.—See Descent and Distribution No. 7.

DRUNKENNESS.

Effect on Contract—See Contracts 1.

DYING DECLARATIONS.

Proof by Oral Evidence—See Criminal Law 6.

EASEMENTS.

Way—How Created.

1. A private passway can not be created by dedication, but it must be granted, and this grant must be proven, either by a writing, or by a continued use and enjoyment, under a claim of right, for the term of fifteen years. *Robinson v. Owsley*570

Way by Necessity.

2. A right to a passage by necessity arises in case the vendor owns lands entirely surrounding the land sold by him. *Robinson v. Owsley*570

Way by User.

3. The right to a private passway may be acquired by continual user for 15 years under claim of right. *Coburn v. Whirner*17

EJECTMENT.

Adverse Holder.

1. If the defendant's position was that of an adverse holder and claimant of the ground, when plaintiff accepted the deed, the plaintiff could not maintain his action. *McLaughlin v. Howard*.....443

Constructive Possession.

2. One who does not hold the legal title cannot be constructively in the possession of real estate. *Hardman & Wife v. Barclay*491

Location of Land.

3. Where the actual location of the land in contest is the question involved, the general recitals in a deed should not be allowed to control the more minute description subsequently given. *Todd v. Bacon*327

[References are to Pages.]

EJECTMENT—Continued.**Title.**

4. In an action to recover land, it is not necessary for the plaintiff to show title back beyond the common source. *Hood & Wife v. Thurman*555

Pleading.

5. Where a petition states that the plaintiff is the owner and entitled to the possession of the land, and after describing the land it then alleges that the larger portion thereof is the property of the plaintiff, thus contradicting the previous averment that he owned all of the land, it cannot be determined from the petition what portion of the land belonged to the plaintiff. *Casteel v. Scaggs*.....185
6. In order to recover under a sheriff's deed the petition must show the execution, levy and deed of the sheriff, also the judgment upon which the execution issued; since the judgment and execution are the authority for selling, and must be exhibited to show that the party's right has been regularly deduced from the original claimant. *Chappell v. Sudduth*57
7. The original petition was defective in not distinctly stating who was in possession of the land sought to be recovered, and the alternative averment in the amendment, that the property was in the actual possession of the defendant or some tenant under her, is also defective. *Hardman v. Barclay*.....491

Pleading—Answer.

8. Where appellant denies that appellee is the owner and entitled to the possession of the land described in the petition, and denies that he now holds, or ever held, possession of the land without right, and denies that he has for years unlawfully kept the plaintiff out of possession, the import of this language is not a denial of the simple fact that appellant was in possession of this land at the commencement of the action, but a denial that his possession was unlawful, since unless every allegation of the petition is specifically denied, it is taken as true for the purpose of the action, and it is not necessary to introduce proof on that point. *Todd v. Bacon*327

Evidence—Deed.

9. Where the land embraced in a deed lies in two counties, the deed may be read as evidence, in an action of ejectment, if it has been recorded in the county where the greater part of the land lies. *Todd v. Bacon*327

Burden of Proof.

10. Where a deed under which the plaintiff claims title, in an action of ejectment, contains exceptions, the burden is on him to show that the land in controversy is not within the exceptions. *Todd v. Bacon*.327

ELECTION.**Requiring Party to Elect—See Pleading 26.****To Take Under Will—See Wills 29.**

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EMINENT DOMAIN.

Excessive Damages.

1. Where the judgment is for more than the entire value of the land taken and the fifteen acres cut off by the road, and exceeds the entire value according to the assessment made by appellee, the damages allowed are unreasonable and excessive. *Elizabethtown & Paducah Ry. Co. v. Stickler*165

Instruction—Value of Land.

2. Since appellees are entitled to be paid the value of the land taken, notwithstanding any enhancement in the value of those not taken, by reason of the construction of appellants' road, the jury should have been instructed that in estimating the value of the land taken, the enhanced value, if any, to the entire tract should not be allowed to enter into their estimate at all. *Elizabethtown & Paducah Ry. Co. v. Klinglesmiths*94

ESTOPPEL.

Estoppel to Claim Damages—See Sales 5.

Of Husband to Coerce Payment of Debt Out of Wife's Property—See Husband and Wife 1.

Of Traversee to Deny That Finding Was for Plaintiff—See Forcible Entry and Detainer 6.

Of Wife to Assert Claim to Property Against Husband's Creditors—See Husband and Wife 10.

Party Joining in Partition Suit—See Partition 3.

To Recover Partnership Money Paid on Individual Debt—See Partnership 4.

To Claim Insufficiency of Notice—See Principal and Surety 6.

To Claim Title by Adverse Possession—See Adverse Possession.

Of Infant to Assert Title to Land—See Infants 2.

Title of Mortgagor.

1. Where a party is active in procuring another to advance money on the faith of a mortgage, he is estopped to deny the title of the mortgagor to the property. *Smith v. Warth*269

To Plead Statute of Limitations.

2. Where the conduct of the appellant was such as to induce appellee to believe that appellant was a principal in a note, and not surety, he is estopped to plead the statute of limitation of seven years. *McElroy v. Dunn*112

To Controvert Right of Owner of Estate.

3. Where the defendant recognizes the regularity of the judgment and surrenders to the sheriff in writing, the land sold in satisfaction of same; to that extent he encourages the purchaser and is therefore estopped to controvert his right to take and hold the estate. *Johns v. Woodson*536

Claim to Remainder.

4. When covert and discover, she persistently and notoriously claimed only a life estate, conceding to her children the remainder,

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ESTOPPEL—Continued.

promoted the sale of that remainder for a valuable consideration, was present when it was conveyed, and neither then nor since, until about the time of the institution of this suit, intimated a claim to the remainder, she is estopped to set up claim to the remainder. *Jackson's Heirs v. Dunean*690

Pleading.

5. Where plaintiff's petition, after setting out the policy of insurance and the loss of the property insured, states "that the agent of the said company is now here and refuses to pay the plaintiff the said amount, as the said company was bound to do by said policy," the company is not estopped from insisting that the appellee should comply with the stipulations of the policy, and the petition presents no cause of action. *Kentucky Ins. Co. v. Green*370

EVIDENCE.

Journals of City Council as Evidence—See Municipal Corporations 12.
Judicial Notice.

1. Courts will take judicial notice of terms of court, and a sale of land made on other than the first day of a term is void. *Cheek v. McKay*199

Judicial Notice.

2. Where it does not appear from the pleadings or proof in the case of *Rudd, Trustee, etc.*, that the infant owns any part of the land in question, but this fact appears in another suit which is consolidated with the former, notice of all the facts disclosed in that case must be taken. *Rudd & Monarch v. Rudd, Trustee, & Taylor*517

3. The courts will take notice of the contents of the legislative journals for the purpose of determining the truth or falsity of any allegation or fact, but they will not examine such journals for the purpose of ascertaining facts, to rebut the presumption of the constitutionality of an act, unless the complaining party alleges the existence of such fact. *Presiding Judge of Washington County Court v. Cumberland & O. R. Co.*.....580

Relevancy.

4. A judgment must be based as well upon the petition as the proof, and testimony which tends to establish some fact not alleged in the petition is irrelevant and incompetent. *Trimble, Adm'r, v. Hensley*.730

Declarations.

5. The mere declaration of a party made on but the one occasion, in a conversation not addressed to either of the witnesses who, years after, are called upon to prove them, in the hearing of no others, and in the treasuring up of which they could have no interest, they being strangers to the speaker, is at most but weak and unsatisfactory evidence. *Daniel v. Wheeler's Ex'r*738

Res Gestae.

6. A conversation which is not concomitant with the principal act nor connected with it so as to form a part of the *res gestae* but a mere

[References are to Pages.]

EVIDENCE—Continued.

narrative of past occurrences. cannot be received as proof of the occurrence. *Campbell v. Seifer*68

Conclusions of Witness.

7. Statements of witnesses which are mere deductions from facts to which they are called to testify, are not admissible, such deductions being the province of the jury. *Townsend v. Commonwealth*785

Documentary Evidence.

8. Under § 18, ch. 35, Revised Statutes, requiring that records and proceedings of the courts of United States shall be attested by the clerk with the seal of the court annexed, and certified by the judge of the court, to be attested in due form before they shall be entitled to faith and credit in this state, the court properly refused to allow a certificate of discharge of bankruptcy to be read in evidence. *Hamilton v. Barnes*167

9. Where a writing purporting to have been executed by one of the parties is referred to and filed with a pleading, it may be read as genuine unless its genuineness is denied by affidavit before trial. *Champlin v. Betz & Schraffenberger*231

10. A memorandum in writing or an account filed as an exhibit and referred to in the pleadings cannot be read as evidence on the trial. *Champlin v. Betz & Schraffenberger*231

11. The record of a prior suit between different parties is not competent evidence in a subsequent suit. *Robinson v. Hudson*256

12. The account books of a company are not competent evidence against a party who was neither a stockholder nor officer in the company at the time the entries were made. *Shaler v. Newport Fuel Co.*283

Handwriting.

13. It is a well-established rule that the comparison of handwriting is not competent evidence. *Howard v. Hunter*535

Weight in Sufficiency.

14. Where a commissioner's report is offered to be read as evidence and objection thereto was overruled, the evidence upon which the report was based, as well as the report itself, being referred to the jury, it was its province to give such weight to the whole as it deemed it merited. *English v. Kulp & Collings*655

Expert Evidence.

15. The conclusions of expert witnesses are entitled to very little weight where they do not agree, either in their test or reasoning. *Smith v. Smith*722

Objection.

16. The parol evidence of the sale of the land was not objected to, and if it had been, the judgment and execution under which the sale was made would have been produced, and objection comes too late when it is made for the first time in the Court of Appeals. *Goode's Adm'r v. Goode*657

[References are to Pages.]

EVIDENCE—Continued.**Objection and Motion to Exclude.**

17. Where an illegal question is propounded to a witness it is not enough to object in case he is permitted to answer, but there must be a motion to exclude it from the jury. *Aubrey v. Commonwealth*. 207

Waiver of Objection.

18. Where the commissioner's report was offered to be read as evidence on the trial, which was objected to and overruled, and the court refused to dispose of the exceptions to the report, to which no exceptions were taken, thereby the objections to the ruling of the court, permitting the report to be read, were waived. *English v. Kulp & Collings* 655

EXCEPTIONS, BILL OF.**Preparing and Filing.**

1. A bill of exception should be prepared and filed at the term of the court at which the judgment is rendered, if at all practicable. *Winscott v. Bricken's Ex'r* 723

Assigning and Filing.

2. A bill of exceptions to be valid as such must be signed by the judge and filed during a term of the court and noted of record, and the court has no power to authorize a bill of exceptions to be prepared and filed in vacation. *Bradshaw v. Woodward* 184

Extension of Time.

3. The circuit court may extend the time for filing a bill of exceptions to a day in succeeding term, but it must be filed on that day or the right to file will be lost. *Greer v. Fleming* 487

Statement as to Evidence.

4. A bill of exceptions will not be considered on appeal, unless it contains a statement that all the evidence introduced on the trial is embodied therein. *Swift's Iron & Steel Works v. Dye* 261

Statement as to Evidence and Instructions.

5. Where a bill of exceptions contains the names of the witnesses and a statement of what each proved on the trial, after which it is said, "And here the proof closed," and "The court then, on motion of the commonwealth's attorney, instructed the jury as follows," and here instructions followed, at the close of which is added, "to which instructions the defendant excepted," such language certainly imparts that the evidence contained in the bill of exceptions was all that was given and that the instructions therein copied are all that were given and refused by the court. *Myers v. Commonwealth* 591

Avowal as to Rejected Evidence.

6. Where a party offers to prove a fact, which the court holds to be incompetent, he should make a statement as to what the evidence would be on that point, and incorporate it into the bill of exceptions. *Johnes v. Cassady* 164

[References are to Pages.]

EXCEPTIONS, BILL OF—Continued.

7. Where the court rejects the divorced wife as a witness against her husband, what she would have proven must appear in the bill of exceptions. *Young v. Young*266

EXECUTION.**Estoppel of Execution Defendant—See Estoppel 3.****Issual Of.**

1. A failure for seven days to issue an execution after it might have issued by an assignor is not such delay as to release the assignor of liability. *Young v. Edwards*334

Issual—Evidence Of.

2. A receipt purporting to have been given by a deputy sheriff, in the absence of proof of his signature, is not competent evidence as to the issual of an execution, because the execution itself or the execution docket is the highest evidence. *Griffith v. Hicks*687

Execution on Void Judgment.

3. If a judgment and the execution thereon are void, the execution gives to the sheriff no authority to take a replevin bond, and it cannot be made the basis of another execution, and a sale under execution on such replevin bond is void. *Merrett v. Moss*596

Knowledge of Property.

4. It must appear by proof that the sheriff had knowledge of property owned by the defendant subject to the execution, and on which he could make the levy, or a knowledge of such facts as should cause him to make exertions to find property, before he can be held liable to the plaintiff for failure to levy. *Commonwealth v. McCarroll*....235

Property Subject To.

5. Where the legal title to land was in B. and he conveyed it, and in the conveyance created a lien for the support of himself and wife, and the guarantee created no incumbrance thereon, the transaction is not affected by the statute providing that where an execution defendant creates a lien on land, his interest may be levied on. *Polk v. McCready*406

Validity of Levy.

6. It is not essential to the validity of the levy of an execution that it shall be endorsed on the execution, and a sheriff may sell under a levy so made, to the exclusion of an execution levied at later date, notwithstanding the levy was endorsed on the latter one. *Steele v. Commonwealth*437

Motion to Quash.

7. A mere motion to quash an execution, the motion having been overruled and nothing else appearing in the record, is not such a judgment as will bar a proceeding in equity to enjoin the collection of the executions upon the grounds of payment even if the relief asked for was one of the grounds set forth in the motion to quash. *Sayer v. Samuel*796

[References are to Pages.]

EXECUTION—Continued.

8. A motion to quash an execution may be made when an execution has been irregularly issued, but issued against the wrong party, or upon a different judgment, or upon a defective sale bond, or by reason of some other defective proceeding. *Sayer v. Samuel*796

Sale Under.

9. It was the duty of the sheriff to sell the several lots of land separately as they were separated by distinct metes and bounds and containing not less than fifty acres, and the written direction to sell the real estate instead of personal property conferred no authority to sell the land as one tract. *Graves v. Thompson*678

10. By the sheriff's sale to M., the equity of the intestate in the land passed, and by the transfer to Banister of Moore's purchase B. acquired the equity, and when Mrs. Goode paid Banister for it, she, in equity, was substituted to all his rights. *Goode's Adm'r v. Goode*657

11. Notwithstanding the landlord's lien, the sheriff had the legal right to sell under the execution against the tenant, the property on the leased premises, and out of the proceeds of such sale he is bound to pay the landlord such rent as has already accrued. *Burford's Adm'r v. Gaither*34

12. Where a sale of land is made under an execution, pending a suit to vacate the deed to the property under which the defendant in the execution holds title, and the case is thereafter decided in his favor, the sale will be set aside if the property sold at a sacrifice for the reason that the pendency of the suit affected the value of the property and had a tendency to prevent others from bidding for it. *Polk v. McCready*406

Writ of Possession.

13. It is error to issue a writ of possession for more land than that sold under the judgment, and to that extent it may be enjoined. *Cooper v. Griffin*3

Indemnity Bond.

14. The judgment upon which the equity of redemption in mortgaged property is directed to be sold should require the purchaser to execute a bond to the effect that the property shall not be removed out of the county, and shall be preserved and forthcoming to answer the incumbrance cited by the mortgage, as in sales of such property under execution. *Durret v. Bouche*667

15. The right to require an indemnity bond is based on the fact that the officer doubts whether or not the property is subject to levy and sale, and failure of the plaintiff to give the indemnity bond does not lead to the conclusion that the return was false. *Durret v. Bouche*667

Indemnity Bond—Sureties.

16. The sureties in the indemnifying bond did not undertake that the sheriff would pay to the landlord his rent, and are therefore not responsible for his failure to do so. *Burford's Adm'r v. Gaither*.... 34

[References are to Pages.]

EXECUTION—Continued.**Priority of Liens.**

17. Where prior liens on land outside of the homestead have been created by levy of execution, there is no equitable principle by which these liens in favor of subsequent creditors can be made subordinate to antecedent debts. *Jameson v. Jameson's Adm'r.*..... 55

Liability of Sheriff.

18. As the law does not furnish the sheriff with the power or the means to go on land upon which he may levy and make surveys thereof, he must act on the best information he can otherwise obtain, and when he has done so he can not be made responsible for the mistake of others. *Central Nat. Bank of Danville v. Balley*.....186

19. Although a sheriff received money under execution without right, and became liable to refund it, it did not create a liability on his part to the plaintiff who holds a sale bond for all he was entitled to. *Galloway v. Herrin* 27

Right of Purchaser.

20. The rights of a purchaser at an execution sale become vested at the time it is made, and they can not be divested nor impaired by subsequent litigation between the plaintiff and defendant. *Johns v. Woodson*536

Return or Offer to Return Money.

21. In an action to cancel a deed fraudulently procured to defeat the collection of plaintiffs' debt, plaintiffs do not allege that they had at any time paid or offered to pay the prior purchaser his money and interest for his bid on the land, and did not tender the money to him when they instituted such suit, and plaintiffs having failed to avail themselves of the right secured to them by the statute, the chancery court can not award them any relief. *Casteel v. Faubush*.....753

Sheriff's Return.

22. The sheriff's return on an execution that he has made a sale of the property and taken bond from the purchaser is prima facie evidence of the fact, but in an action on his official bond for failure to take a sale bond, it is incumbent on him to prove that fact, where the bond is lost or misplaced by him. *Commonwealth v. Rothwell*....251

23. The creditor's right to resort to equity does not depend on the truth of the return of the officer, but upon the fact that the execution has been returned, "No property found," and such return is conclusive between the parties, and its verity can not be inquired into without making the officer a party. *Durret v. Bouche*.....667

Redemption.

24. The fact that the time to redeem land sold under an execution has expired does not affect the right of the execution debtor to have the sale set aside for irregularities, where the right of redemption has been sold under another execution before the time to redeem under the first sale has expired. *Graves v. Thompson*.....678

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EXECUTION—Continued.

Recitals of, as Evidence.

25. The recitals in an execution that it was issued on a replevin bond is not evidence of the existence of such bond, which bond is a quasi-judgment. *Moss v. Moss*.....464

EXECUTORS AND ADMINISTRATORS.

Appeal Required by Administrator.—See Appeal 5.

Insolvency of Estate.—See Insolvency.

Marriage of Executrix.

1. Upon the marriage of an executrix her power over the entire estate ceases, since being under the legal control of her husband, she in legal contemplation has no discretion or power independent of him. *Honaker v. Honaker*.....543
2. The marriage of an administratrix divests her of such representative capacity, but does not deprive the estate or its representatives of the right of appeal. *Shercliff v. Cooper*.....774

Presumption as to Debt.

3. The presumption is that after the lapse of five years from the grant of administration no debt will come against an administrator, and if under the statute he should be liable, a judgment of the court requiring him to pay the assets to its receiver would discharge him from liability, and a refunding bond is therefore not necessary. *Winfrey's Adm'r v. Griffin*.....338

Support of Widow.

4. An executor may make an agreement for the support of the widow, and is entitled to credit, on settlement, for the amount so paid. *Cralle v. Marshall*.....41

Liability of Estate.

5. Where intestate made a contract with appellee to board his wife and child during the time he should remain in the army, from September, 1861, the time he left, until he died, in December, 1862, his estate was bound for the reasonable price for the board of the wife and child until his death, but after that time his widow was responsible out of her own estate for the board of herself and child, but she could charge the estate of the infant son with a reasonable sum for his maintenance. *Parrish's Adm'r v. Cowles*.....574

Liability for Interest.

6. An administrator has two years in which to settle his accounts, and during that period he has a right to retain the assets to pay debts and liabilities against the estate, and is not liable to pay interest, unless he has put the money at interest or has made profit on it. *Hines v. Humphreys*.....45

Claim Against Estate.

7. A demand against a decedent's estate arising after death is not embraced in the provisions of § 35, Art. 2, Chap. 37, R. S., Vol. 1. p. 509. *Garvey's Adm'r v. Garnett*.....696

[References are to Pages.]

EXECUTORS AND ADMINISTRATORS—Continued.**Claim of Administrator.**

8. If an administrator has a claim against the estate, he should make a settlement of his accounts before he subjects the real estate to the payment of his debts. *Thomas v. Miller & Wife*.....349

Contest of Claim.

9. If a voucher against a decedent's estate is made out and proven according to law, this does not preclude the executor from contesting it, and where an issue is formed the *ex parte* statements made in the form of an affidavit can not be read without the consent of the parties. *Stivers' Adm'r v. Potter's Adm'r*..... 99

Set-off or Counter-Claim.

10. Where a personal representative has commenced litigation, a claim against the intestate can be pleaded by way of set-off or counter-claim as a defense to the action, without the affidavit and demand prescribed by the Civil Code. *Amsbro v. Byrne's Adm'r*.....191

Compensation.

11. Five per cent. is the usual allowance made to personal representatives as compensation for the amount collected by them, and sometimes a commission of 5 per cent. will be allowed only on disbursements, but it may be allowed on the amount collected, and in cases of much trouble and difficulty in collecting, when the debts are small, 7 per cent. may be allowed, but to authorize such an allowance the difficulties enumerated must be proven. *Bowman v. Bowman's Adm'r*205

12. Where a personal representative acts as commissioner on making sales of land belonging to the decedent's estate, a reasonable allowance should be made to him in addition to his commission. *Bowman v. Bowman's Adm'r*.....205

Suit by Administrator.

13. In a suit by an administrator *de bonis non* against a former administrator the court should compel him to surrender all the choses in action and chattels belonging to the estate in order that the former could enforce payment or make the latter liable for their value, but the sureties can not be held liable to the administrator *de bonis non*, while they would be to the heirs and creditors. *White v. Dunn*233

Power of Sale.

14. Where an executor has power under the will to sell and convey real estate, he may complete by conveyance any sale made by the testator, and his deed will vest the purchaser with a perfect title to the land. *Grubbs' Ex'r v. Satterfield*.....662

Settlement Suit—Pleading.

15. In an action by an administrator to settle the estate of the deceased, a creditor does not have to set up his claim against the estate by answer or other pleading, but he may present his side to the commissioners by vouchers, as required by statute. *Dollins v. Perry*..763

[References are to Pages.]

EXECUTORS AND ADMINISTRATORS—Continued.**Sale—Account Of.**

16. An administrator should keep accurate accounts of all sales of the personal property of the estate, whether made publicly or privately, and if he fails to do so his liability on account of such property can only be ascertained by adopting the appraisal as correctly setting out its value. *Hayden's Adm'r v. Bell & Son*.....469

Costs.

17. Where an administrator brings suit to settle the decedent's estate, all the costs should be paid out of the general estate. *Cummins v. Bradford* 78

EXEMPTIONS.

When Homestead Is Not Exempt.—See Homestead 3.

Right of Exemption.

1. The right of exemption depends upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family, and does not exist where the residence of the debtor is permanently located elsewhere. *Wilson v. Stoner*751

2. If the actual residence of the husband is on the wife's land, he can not assert any claim to exemptions in land owned by him adjoining or elsewhere, nor is the court compelled in every judgment rendered to reserve the right of homestead in the land, when no such right is asserted. *Wilson v. Stoner*.....751

FACTORS.**Definition.**

A factor is one who may buy and sell in his own name as well as in the name of his principal, and is intrusted with the possession, management, control and disposal of the goods to be bought and sold, and has a special property in them. *James Graham & Co. v. Duckwall. Fitch & Co.*.....495

FALSE PRETENSES.**Indictment.**

1. Where the indictment charges that the defendant wilfully and knowingly misrepresented the number and quality of the watches and chains contained in a box, and the genuineness of the note on G., by said misrepresentation as to the value of the property delivered he deceived E. as to his ability to repay the loaned money, and the offense was sufficiently charged. *Converse v. Commonwealth*228

Special Damages.

2. Special damages in a case like this can be recovered only where the false representations are made maliciously and with intent to injure, and it must appear that actual injury was thereby done, and it is not enough to charge that a creditor is induced to sue and attach

[References are to Pages.]

FALSE PRETENSES—Continued.

by reason of false and malicious representations, it must be alleged that the attachment was discharged on the hearing of the case. *Kenner v. McIntyre*.....527

FEEES.

Lien For.—See Courts 5.

FERRIES.**Jurisdiction.**

Where both parties assumed that a legal ferry already existed at or near the point proposed, and the ground of controversy is as to which of them owns the privilege, the question can not be settled in a proceeding commenced in the county court upon a motion to establish a new ferry. *Gresham v. Gresham*.....665

FORCIBLE ENTRY AND DETAINER.**Forcible Entry.**

1. A forcible entry is an entry on land or tenements without the consent of the person having the possession in fact of the premises. *Price v. Gatt*.....572

Forcible Detainer.

2. The appellant entered under a contract as tenant with the privilege to purchase the land by paying the specified sum on the day named, and, failing to comply, he thereby elected to hold as tenant, and, having refused to surrender possession at the end of the year, he subjected himself to be proceeded against as a forcible detainer. *Hill v. Morris*355

3. Where appellant, having entered and held the land in dispute, as the appellee's tenant in 1869, and during that year verbally negotiated for a renewal of his lease for 1870, but on the first day of that year refused to execute the new contract, and openly disclaimed to hold under the appellee, and asserted claim to the possession exclusively as the tenant of another, refusing to make restitution of the premises to appellee, he is liable to the proceeding by warrant for forcibly detaining the possession. *Poston v. Mercer*.....565

4. Forcible detainer is the refusal of a tenant to surrender to his landlord the lands or tenements demised, after the expiration of his term. *Price v. Gatt*.....572

Traverse Bond.

5. The statute requires that the traverse bond must be given to the adversary of the party traversing within three days after the finding of the jury. *Garrett v. Phillips*.....622

Estoppel.

6. Plaintiff having selected his adversary and executed a traverse bond to him, he is estopped to deny that the finding was for plaintiff in the country. *Garrett v. Phillips*.....624

[References are to Pages.]

FORFEITURES.**Object of In Contract.**

The object of the forfeiture or its being made a part of the contract was to insure its fulfillment, and when this is the case, and the party seeking the forfeiture has his remedy to recover damages by suit, the forfeiture, which amounts to a penalty only, can not be enforced. *Lee v. Davis*617

FRAUD.**In Sale of Land.**

1. Where the appellee upon the reception of a fraudulent letter as to the value of the land proceeded to the home of the appellant and there upon the faith of such letter contracted to pay for the land ten times its value, a chancellor will not permit such an inconceivable bargain brought about by such fraudulent means to remain obligatory. *Adams v. McBarr*..... 88

Collateral Attack—Judgment.

2. A judgment can not be collaterally attacked for fraud, but can only be annulled by direct proceeding affording as a high grade of evidence as that upon which it is based. *Sears v. Bryant*.....737

FRAUDS—STATUTE OF.**Promise to Answer for Debt of Another.**

1. Where appellant undertook to satisfy the debt he owed H. by paying the amount to H.'s creditor, it was a promise founded on sufficient consideration, and need not be in writing to make it obligatory. *Morris v. Tyler's Ex'rs*.....453

Resulting Trusts.

2. The statute of frauds does not apply to resulting trusts, and such trusts will be enforced, although evidenced by parol agreement. *Mayo's Heirs v. Hager*.....619

Repeal of Statute.

3. The statute of frauds is subject to be repealed at any time by the lawmaking power, and a parol contract for the sale of land be enforced like any other contract. *Pratt v. Cox*.....410

FRAUDULENT CONVEYANCES.**Conveyance by Husband to Wife.**

1. Where a conveyance to a husband shows upon its face that it was intended merely to invest in him title to the land, while his wife and family were to continue to enjoy its profits, such conveyance can not be upheld as against his creditors. *Patterson v. Field*.....393

2. Where at the time of the execution of the deed and assignment of the bond to a wife her husband was not indebted to the appellants, her right to the property is superior to that of any of her husband's creditors. *Creely v. Kemper & Wife*.....648

[References are to Pages.]

FAUDULENT CONVEYANCES—Continued.**Estoppel.**

3. It is not consistent with the principles of equity that appellant, after having permitted the legal title to remain in B. for ten years without any effort to divest him of the title, should be permitted to come in and defeat the claims of B.'s creditors and other innocent parties who trusted him on the faith that he was the owner of the land. *Maloney v. Balee*.....454

Possession—Presumption.

4. Where a debtor sells personal property and still retains the possession it will be presumed that the sale is fraudulent as to attaching creditor. *Stephens v. Boswell*98

Insolvency—Conveyance.

5. Where an insolvent debtor executes a mortgage on his property to secure the payment of a debt, some of which was previously due, however inconsiderable that debt may be, it brings the conveyance within the inhibitions of the acts of 1856. *J. B. Wilder & Co. v. L. Pepper & Co.*.....265

Improvements.

6. If the sons permitted their father to make valuable improvements upon their real property, with funds which he should have applied to the payment of his debts, they could not complain that their father's creditors should be allowed to subject such improvements to the payment of their claims, and their assignee, with knowledge of the facts, is in no better position than the sons. *Rawlings v. Bosley's Adm'r.*..258

Right of Heir.

7. Where plaintiff proves that defendant caused the land to be conveyed to C. to protect it from defendant's creditors, C. has the right to hold it as against defendant and his heirs, and the heirs of defendant will not take any part of it by inheritance. *Baxter v. Fielder.*..214

Preference Creditors.

8. Where F., L. and M. were partners in running a planing-mill, and F. and L. left the state, at which time the partnership property was insufficient to pay the partnership debt, and M. executed a mortgage to his father for the purpose of securing a debt owing him by the firm, which was executed in the firm name and for the purpose of securing only firm liability; as the proof shows that the partnership effects were not sufficient to pay the firm's debts, the mortgage of M. was to secure his father in preference to other creditors. *Higgenson's Ex'rs v. Fitzhenry*84

Parties.

9. In an action to subject property fraudulently conveyed to the debts of the vendor, he, as well as the vendee, must be made parties by appropriate pleading and summons must issue against all of them before a court of equity will take jurisdiction. *Talbott v. Phillips & Scally*401

[References are to Pages.]

FRAUDULENT CONVEYANCES—Continued.

Pleading.

10. In an action to set aside a conveyance as fraudulent, if the petition shows that the mortgaged property is sufficient to pay both debts, the equity of redemption, only, will be adjudged to be sold to satisfy plaintiff's debt. *Durret v. Bouche*667

GAMING.

Indictment.

1. If an indictment informs the defendant definitely of the offense with which he is charged, and a conviction would have barred a subsequent prosecution for suffering gaming in his house, it is sufficient. *Aubrey v. Commonwealth*207

Evidence.

2. While the unlawful conduct of the defendant's agents in the control of his house may have been strong evidence of his own guilty knowledge, yet it did not constitute his guilt. *Commonwealth v. Wells*195

GARNISHMENT.

Defenses.

1. Where the pleadings show that appellant's indebtedness to appellee was for a tract of land for title to which he held the bond of the latter, and that by this bond Innes covenanted to make appellant a general warranty deed to the land, the appellant, who occupies the position of garnishee, should be allowed to avail himself of every defense he could have made had suit been brought against him by Innes. *Sanders v. Lawson*726

Personal Judgment.

2. Where appellees took a rule against appellant to show cause why it had not made payment into court of the sum admitted to be due as garnishee, and appellant responded that it did not have the money, thereupon the court made an order placing the company in the hands of a receiver, which was a final order, as the appellant was only a garnishee, it was error to render a personal judgment against it or place its property in the hands of a receiver. *Shelbyville & Bellevue T. P. Co. v. Washburn*731

GIFTS.

Promise to Make—Consideration.

1. The naming of a child for another is not sufficient to uphold a promise to make a gift, where no relation existed. *Rain v. Sturgeon's Adm'r*575

Enforcement of Promise.

2. An individual can make a gift by delivery but his mere promise to make a gift can not be enforced, although in writing, unless there is a consideration for the promise. *Rain v. Sturgeon's Adm'r*575

[References are to Pages.]

GRAND JURY.

Eligibility of Grand Jury.

A processioner of land is a civil officer and is therefore disqualified to sit on a grand jury. *Commonwealth v. Phillips*.....759

GUARDIAN AND WARD.

Guardian's Bond—Surety.

1. Where a surety on a guardian's bond has been compelled to pay on default of his principal, he will in equity be substituted to all the rights and remedies of the ward, against the principal in the bond and the party who has the actual possession of the estate. *Kenney v. Kidd*546

Liability for Loss.

2. A guardian may be required to make good loss sustained by his wards by reason of his failure to protect their interests. *Vaughn v. Tinsley's Adm'r*705

Property of Ward.

3. Where an infant inherited money from her grandfather and, having no statutory guardian, her father took charge of her property and bought a tract of land and paid the purchase price out of the money inherited by her, and the father afterward mortgaged the land, the mortgagees having notice that it had been paid for with the infant's money, and the mortgagees made an assignment and their assignee brought suit to foreclose the mortgage, making the infant and her father a party thereto, the father held the money as the natural guardian of his daughter, the infant daughter may take the land, or consider it as security for the money; and the father's possession of his daughter's property as natural guardian does not subject it to his creditors nor make a sale effectual against the infant, and the infant cannot consent to the disposition of the property, and in such case the trust results in favor of the infant and she is entitled to her money which is invested in the land. *Reeves v. Moore*395

Sale of Property.

4. In proceedings by the statutory guardians of infants to sell their real estate, before a court shall have jurisdiction to sell, three commissioners must be appointed and must report under oath to the court of the net value of the infants' real and personal estate, and the annual profits thereof, and whether the interest of the infants requires the sale to be made. *Hall v. Summers*28

Purchaser—Bond.

5. If the money to which appellant was entitled was otherwise secured, the failure of the purchaser to execute bond does not affect the sale. *Edwards v. Carter*59

HANDWRITING.

Comparison of, Not Evidence—See Evidence 13.

[References are to Pages.]

HARMLESS ERROR.**Instructions to Jury—See Appeal 20.****Order Discontinuing Case—See Appeal 19.****HIGHWAYS.****Obstruction Of—Nuisance.**

1. If a man close up a public highway, whereby it is stopped up to the use of the public, it is a nuisance, common to all, for which he may be prosecuted by the commonwealth, but a suit against him can not be maintained by a private individual. *Coburn v. Whirner*..... 17

Action—Obstruction.

2. One having a common interest in a public highway, which belongs equally to all and in which the party suing has no special or peculiar property, he can not maintain a suit for obstruction, as an obstruction would be a nuisance common to all. *Hahn & Harris v. Figg*547

Action—Party.

3. Where a party sustains special damages on account of the obstruction of a highway, the party thus injured may sue in his own name. *Hahn & Harris v. Figg*.....547

HOMESTEAD.**Assertion of Right To.**

1. The debtor or his family may assert their right to a homestead during the pendency of the suit, if in equity, or they may oppose the confirmation of any sale by which they are attempted to be deprived of this right and the possession of the property in which they have a homestead. *Wilson v. Stoner*.....751

Exemption.

2. Where a house and lot said to be subjected in debt was owned by the debtor before any of the debts owing to plaintiff were contracted, and the property was worth less than \$1,000.00, and the debtor was a bona fide housekeeper with a family, living upon rented property and owning no other real estate except such house and lot, and he did not use the house as a residence, from the fact that it had not been completed, and the debtor sold it to ..., and N. sold it to debtor's wife, no consideration passing, and the debtor manifested no intention to occupy the house when completed, the house and lot were exempt from sale on execution, attachment or judgment of any court, and although the conveyance was made without consideration and with possible intent to defraud creditors, still the property was not subject to the payment of the debtor's debts before the conveyance, and the fact that the title passed to his wife does not change its status. *H. S. Buckner & Co. v. Winford, Newkirk & Co.*.....391

3. A homestead is not exempt from execution for debts created prior to June, 1866. *Jameson v. Jameson's Adm'r.*..... 55

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HOMICIDE.

Instruction.

1. An instruction that unless the jury are satisfied from all the evidence, beyond a reasonable doubt, that the defendant purposely and intentionally shot deceased, they must find him not guilty, it is more favorable to defendant than he was entitled to. *Townsend v. Commonwealth*785
2. The court should in an instruction group together certain facts, such as threats, previous encounters and the character of the deceased, and give them undue prominence by making the question of guilt depend upon their existence or non-existence. *Carter v. Commonwealth*777
3. By refusing to instruct as to the law of manslaughter, the court judicially determined that the evidence did not authorize the jury even to entertain a reasonable doubt as to the grade of the offense committed. *Carter v. Commonwealth*.....777

HUSBAND AND WIFE.

Power of Married Woman to Dispose of Property by Will.—See Wills 2.
Recovery Against Wife for Goods Sold to Husband.—See Sales 2.

Wife's Separate Estate.

1. The husband can not invest his wife with a separate estate in his own property, even in the proceeds of her own labor, to the prejudice of his creditors, but it may be done with the consent of the creditor, and in that event he is estopped by his own act to coerce payment of his debt out of the wife's separate property. *McDonald's Trustee v. Hayman*116
2. There is no principle of law or equity that would prevent the wife from changing, by parol, the nature and character of her separate estate, and vesting husband with absolute title. *Allen v. McGrath*.. 12
3. A wife may dispose of her separate estate secured to her by antenuptial contract when she reserves the right so to do. *Daniel's Devises v. Daniel*670
4. Property given to a wife before her marriage, without restriction or limitation, can not, after marriage, be converted, by the donor, into her separate estate, to the prejudice of her husband's creditors. *Chas. Brown & Co. v. W. J. Arnold & Co.*.....236
5. A wife can not convey land to her husband, because she can not, on account of her disability of coverture, unless her husband joins her in its execution, and he can not join in a deed to himself. *Sayers v. Coleman*733
6. The statute provides that upon the joint petition of husband and wife, a court of equity is invested with the power to authorize a married woman to use, sell and convey any property she may have or thereafter acquire, and may contract, sue and be sued as a feme sole. *McDonald's Trustee v. Hayman*.....116

Conveyances and Contracts.

7. Where the evidence fails to establish any act or acts upon the part of the husband tending toward coercion, the questions of delicacy

[References are to Pages.]

HUSBAND AND WIFE—Continued.

and propriety can not be considered by courts of justice. *Kline v. Flaughner*197

Sale and Reinvestment.

8. However anxious the court may be to sustain an investment made by an executor at the instance of the wife, as the answer of appellants alleges, still it can not be done in the absence of proof showing that the allegations of the answer are true and that such investment was made. *Reed v. Reed*.....409

Conveyance to Wife.

9. The residue of the land not paid for with the proceeds of the wife's land having been paid for by her husband and having procured that residue to be conveyed to her separate use, he must be regarded and is in fact her donor, and having joined his wife in the mortgage, he as donor has thereby consented to the same. *Carpenter v. Carpenter*755

Estoppel of Wife.

10. Where a wife permits her husband, with her own knowledge and consent, to use her money for his own purpose and to announce to his creditors and customers by his public advertisements and in the sale of his goods that he was the owner of the establishment, she thereby deprives herself of the right to assert her claim to the property as against his creditors. *Allen v. McGrath*..... 12

Equity of Wife—Creditors.

11. Where the wife's claim is a mere equity and there is no legal demand to which she can be substituted, such a claim can not be enforced to the prejudice of her husband's creditors, and for this reason her claim is not embraced in the statute providing for the settlement of insolvent decedent's estates, making all debts and liabilities of equal dignity and payable ratably. *Hughes v. Hughes*.....681

Devise to Husband and Wife—Estate.

12. Where real estate is devised to a husband and wife, there is no mutual right to the entirety by survivorship between them; but they shall take as tenants in common, unless a right of survivorship is expressly provided for and the respective moities is subject to courtesy or dower. *Bryant v. Owen, Trustee*..... 33

Investment for Wife.

13. Where it is conceded that the husband's power to purchase land for his wife was restricted to her ratification and approval and that she had neither ratified nor approved the purchase, nor accepted the conveyance, the fact that the deed had been recorded does not conclude her, but she may still raise an issue of fact as to whether or not she accepted it. *Martin and Wife v. Allen*.....105

Sale and Reinvestment.

14. Where the wife at the time of her marriage was the owner of real estate inherited from her father, and after marriage her husband

[References are to Pages.]

HUSBAND AND WIFE—Continued.

induced her to sell the land for reinvestment, the proceeds being invested in other land to which the husband took title under agreement that if he died first he would arrange by will or otherwise that she should become the owner of the land, and the husband died suddenly without securing the property to her, a court of equity will enforce the agreement to secure the wife in her right to the property. *Burton v. Burton*240

Joint Note of Husband and Wife.

15. Where the credit is given to the wife and she joins with her husband in the execution of a note, a recovery may be had against her, especially where the husband is insolvent. *Howard v. Peters*..369

Waiver by Husband of Right to Reduce Wife's Property.

16. The husband has the right to make himself the absolute owner of his wife's property by reducing it to possession, but if he agrees to take and hold the same as trustee for his wife, he thereby waives that right. *Johnson v. Leach's Adm'r*.....528

Promise by Wife to Pay.

17. Where defendant spoke of paying her debts and said they ought to be paid and that she was going to pay all her debts, but did not say particularly that she was going to pay these debts in suit, such a conversation can not be construed into a promise to pay the notes in suit, when she was then resisting the collection of the same. *Henking, Alle-mong & Co. v. Harris*.....531

Rights of Husband's Creditors.

18. A husband has the right to secure to his wife and family a home when it is not done at the expense of his creditors, but he can not add to his wife's estate by his labor and thereby increase her estate, regardless of the claims of his creditors. *Mathews v. Murphy*.....131

Antenuptial Agreement.

19. Where the language of an antenuptial agreement indicates that all the estate then owned or might afterward be acquired by the wife, whether real or personal, was intended to be embraced in the contract, but the conveyance to the trustee made for the purpose of carrying the agreement into effect, conveyed only such personal property as she could then own or might afterwards acquire, the realty did not pass by the deed to the trustee. *Daniel's Devisees v. Daniel*.....670

Tenant by Curtesy.

20. Where a husband enters upon land with his wife, and in her right, under an arrangement with the executor of her father, he can not, while thus occupying, set up an adverse claim to her; and as he has only a life estate by the curtesy, nothing more passes by his deed or mortgage. *Smith v. Warth*.....269

Liability for Necessaries.

21. The statute makes the estate of the wife liable for necessaries furnished when evidenced by a writing signed by herself and husband,

[References are to Pages.]

HUSBAND AND WIFE—Continued.

but no personal judgment can be rendered against her. *Payne v. Bayze*258

Liability for Rent.

22. The renting of property by a husband and wife does not in law of equity make the wife responsible for the rent, and her separate estate can not be subjected to the payment of her husband's debts.

McDonald's Trustee v. Hayman.....116

IMPROVEMENTS.

Permanent Improvements by Purchaser at Decretal Sale.—See Judicial Sales 4.

When Amounting to Reinvestment.—See Trusts 17.

Liability For.

1. Appellee having made the improvements in good faith was entitled to be paid for them, just the amount the land was enhanced in value at the time the suit was brought, he being liable for rent beginning at the same time. *Elder v. Procise*..... 44

2. Where the appellee contributed the money necessary to construct the storehouse in controversy, which was built on the lands of the appellant and with his full knowledge and consent, although there was no contract between them, and appellee occupied the house for some months previous to the institution of the suit, with the acquiescence of appellant, and while the building was being constructed, the appellant talked with appellee about it, and spoke of the manner in which the foundation was to have been built, a court of equity, under such circumstances, would not give to the owner of the land this expenditure of the appellee's money without some compensation, and that appellee has an equitable right to recover the value of the house, less the rent. *Vanmeter v. Woods*.....316

INDEMNITY.

Indemnity Bond.—See Execution 15.

INDICTMENT AND INFORMATION.

Indictment.

An indictment should show that it is found by a grand jury of a county or city impaneled in a court having authority to receive it; that the offense charged was committed within the jurisdiction of the court at a time prior to the finding of the indictment; that the act or omission charged as an offense be stated with a degree of certainty as to enable the court to pronounce judgment on conviction. *Commonwealth v. Bland*.....795

INFANTS.

Contract of—Enforcement.

1. In order to enforce the contract of an infant it must be shown that the property purchased was necessary for his support, and where

[References are to Pages.]

INFANTS—Continued.

the whole fortune of the infant is less than \$1,000.00, the annual profits of which would not be sufficient to maintain him in the most economical style, a horse is not a necessity. *Williams v. Portwood*.....737

Bond for Title—Estoppel.

2. Where an infant sells his land and executes a bond with security that he will make a perfect title when he arrives at twenty-one years of age, the surety in the bond is estopped to assert title to the land against the infant's vendor. *Holland & Wife v. Crutchfield, Stone & Co*.....381

Guardian Ad Litem.

3. The failure of a guardian ad litem to file an answer for an infant in a proceeding to sell his land does not render the judgment void, although it is a cause for reversing it. *Dollins v. Perry*.....763

Pleading—Verification.

4. Where infants are the real plaintiffs in an action and are old enough to understand the provisions of the code relative to the verification of pleading, they should be required to verify the petition. *Goins v. Herndon* 70

Sale for Reinvestment.

5. Where an infant's real estate is sold for reinvestment and the proceeds reinvested in other lands, in the event the sale shall be adjudged to be void the purchaser of the infant's land is entitled to the property in which the proceeds have been invested. *Headley v. Simmons* 65

Sale—Impeachment.

6. A sale of an infant's land can not be impeached in a collateral proceeding. *Edwards v. Carter*..... 59

Sales—Defective—Curative of Statutes.

7. The legislature has power to enact laws authorizing the courts of the county, by proper proceeding, to confirm defective sales of infants' real estate, and that, too, in cases where the sale under the original judgment did not invest the infant with title, and the legislature can confer upon a court of equity the power to execute and consummate a parol contract as against infants, made by the father, if from the proof the court deems it beneficial to the infant. *Pratt v. Cox*.....410

INJUNCTION.

Persons Bound By.

1. A mere injunction which might compel all within the jurisdiction of the court to refrain from action, could afford appellants no relief against those upon whom they could not get actual service of process; and where the debtor was not within the jurisdiction of the court, it was needful that they seize on some property, choses in action, or something upon which the judgment of the court could operate. *Minor & Dallam v. Smallwood & Querry*.....385

[References are to Pages.]

INJUNCTION—Continued.

Injunction Bond—Petition.

2. Where the petition in an action on an injunction bond alleges the execution of a bond, the dissolution and the dismissal of the action, and recites the amount of the judgment enjoined and the failure of defendant to pay, it is not subject to demurrer. *Cleveland & Scott v. Phillipps & Ison*.....785

Judgment—Proof of Fraud or Mistake.

3. In a proceeding to enjoin the collection of a judgment upon the grounds of fraud in obtaining it, or mistake of fact by the defendant, it must be shown that such fraud or mistake was discovered subsequent to the rendition of the judgment, and when a party fails to make a defense in a suit at law, in the absence of fraud on the part of the plaintiff in obtaining the judgment, it will not be set aside. *Whitson v. Bright*341

Personal Judgment—Proceeding in Rem.

4. Where defendant was absent and personal service of process could not be had upon him, a personal judgment can not be rendered against him, the only effectual relief being by proceeding in rem. *Minor & Dallam v. Smallwood & Querry*.....385

Damages.

5. Although the action of trespass might have been maintained by the appellee for the destruction of his corn by the appellant, still this does not preclude him from his action against the appellant for the damages sustained by reason of the injunction. *Caldwell v. Baker*..784
6. Where appellee was entitled to gather his corn, and where in the meantime it had been gathered by appellant, appellee is entitled either to the corn or its proceeds. *Caldwell v. Baker*.....784

IN REM.

Proceeding In.—See Conjunction 4.

INSOLVENCY.

- Although the sale of the deceased's estate after his death shows that it was insufficient, at that time, to pay his debts, it does not necessarily follow that he was unable to pay them at the time he executed a mortgage. *Yowell's Adm'r v. Yowell, Adm'r*.....321

INSURANCE.

Recovery of Premium.

1. Where a policy of insurance is forfeited by the violation of its terms by the insured, he can not recover the premium paid thereon. *Sargel v. United States Fire & Marine Ins. Co.*.....272

Notice of Contract.

2. Where the charter provides that if a member neglects to pay an assessment for thirty days after it should become payable, he is ex-

[References are to Pages.]

INSURANCE—Continued.

cluded from all benefits under his insurance, it constitutes notice of the contract between the company and the member, and is in no sense a forfeiture of his interest in the company, but it is an equitable limitation on the right of the first to break the covenant to recover on it. *Merhoff v. Hope Ins. Co.*.....110

Assessment—Notice Of.

3. The object of the charter in requiring the notice of assessments to be made public was that each member of the company might have an opportunity to inform himself of the fact, and after thirty days' publication the law will imply notice and hold the member to the consequences of non-payment, although he had no actual notice of his duty to pay. *Merhoff v. Hope Ins. Co.*.....110

4. Actual notice of assessment was all that the charter required, and if appellant neglected to pay the same, he must be regarded as electing to suspend his right to collect his policy of insurance, such suspension being an essential part of the contract. *Bronger v. Hope Insurance Company*..... 18

Forfeiture.

5. Where plaintiff accepted the policy with the proviso therein, "that in case the assured shall already have made other insurance, or may hereafter make other insurance on the hereby insured premises, notice of the same shall forthwith be given to this corporation," and the day after appellant had effected insurance in appellee he had the same property insured in another company without giving appellee notice thereof, the acts of plaintiff forfeited the policy he held in defendant company. *Sargel v. United States Fire & Marine Ins. Co.*..272

INTEREST.

Liability of Administrator for.—See Executors and Administrators 6.
When Begins to Run.

1. By the terms of the writing evidencing the sale as to appellant, the purchase-money was not due appellee until he performed the conditions precedent of having the land run out and a sufficient deed made, and interest on the deferred payment did not begin to run until that was done. *Butts v. Hazelrigg*.....221

On Foreign Judgment or Decree—Presumption.

2. Where the note sued on was executed in the state of Ohio, and appellants insist that no judgment could be rendered for the interest without first ascertaining, without proof, the rate of interest in that state, any indebtedness incurred or evidenced by judgment or decree rendered out of this state shall be presumed, unless the contrary be shown, to bear like interest as if it had been incurred in this state. *Chalfant & Morris v. Asbury*.....241

Burden of Proof.

3. The burden of proof is on the party charged with a debt created in another state to show the rate of interest where the note or contract was executed. *Chalfant & Morris v. Asbury*.....241

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INTOXICATING LIQUORS.**Purchase of Adulterated Whisky.—See Sales.****Licenses to Sell—Discretion.**

1. The granting of license to retail spirituous liquor is within the discretion of the county court, notwithstanding there has been a vote of the people on that question. *Brown v. Commonwealth*.....250

Unlawful Sale—Indictment.

2. An indictment for the unlawful sale of intoxicating liquors must state every fact necessary to give jurisdiction, and where that is not done the court can not assume the existence of any such facts. *Commonwealth v. Cooper*.....760

INTOXICATION.**Effect on Contract.—See Contracts 1.****JUDGES.****Special—Police Court.**

1. The special judge of a police court having no jurisdiction, his order appointing a commissioner is void, and the commissioner is not entitled to compensation. *Steinberger v. Taylor*.....106
2. Since there is no statute authorizing the appointment of a special judge of a police court, the selection of one by the parties does not invest him with judicial functions, and his findings and judgments are nothing more than an award, and can not be enforced as a judgment, and no appeal lies to the county court. *Steinberger v. Taylor*106

JUDGMENT.**Annuling by Direct Proceeding.—See Fraud 2.****Final Judgement.—See Attachment 10.****Judgment by Court of Appeals.—See Appeal 14.****Judgment Exceeding Amount Alleged in Petition.—See Appeal 36.****Judgment in Consolidated Action.—See Actions 2.****Defective—Amendment.**

1. If the original petition did not authorize the direction in the judgment that it should be levied on trust estate in the hands of the defendant, the amendment filed after the judgment was rendered could not cure the defect. *McElwain v. Wright*.....450

Interlocutory Judgment.

2. An interlocutory judgment may be entirely disregarded by the court when the final judgment is rendered. *Lester v. Winfrey*....612

Final—Power of Court Over.

3. The suit having been dismissed as to a portion of the land at a previous term the court, such judgment is final, and the court at a subsequent term has no power over it. *Jones v. Hopper*.....379
4. A judgment can not be final merely because it decides some question of law or fact relating even to final relief, nor merely because it

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JUDGMENT—Continued.

decides what are the rights of the parties as to such relief. *Lester v. Winfrey*612

On Cross-Petition.

5. A judgment can not be rendered on a cross-petition until service of summons on the defendants therein, either actually or constructively. *Zeigler & Wife v. Brown*.....716

Set-Off.

6. No matter of set-off can be applied to a judgment previously rendered and in full force. *Geoghegan v. Miller's Adm'r*.....23

Subjecting Real Estate.

7. A judgment subjecting the real estate described in the petition was not authorized by the pleadings, as there is no allegation in the petition that the appellant had any lien on the property, since as between the vendor and vendee no lien exists unless retained in the deed. *Barker v. Compton*.....70

Necessity of Proof.

8. Where the material allegations of the petition are denied, it is error to render judgment against the defendant in the absence of any proof. *Taylor v. Duvall*.....322

Order for Restitution.

9. The chancellor has the power to remedy the injustice which may have been done under his own orders when vacated by an appellate tribunal, and an order for restitution can not be resisted on the grounds of any equity thus disposed of by the dismissal of the bill. *Doty v. Bence's Heirs*634

Rescission of Contract.

10. A judgment rescinding a contract of assignment of a title bond without litigation between the assignor and the maker is erroneous. *Grady v. Bailey*.....644

11. The proceedings by rule or motion for restitution of money or property obtained under the direct operation of a judgment which has been reversed is well known to the courts of law, and is equally allowable in courts of equity. *Doty v. Bence's Heirs*.....634

Of Dismissal—Cost.

12. A judgment dismissing an administratrix's petition at her cost is not a judgment against her personally, but against her fiducial character. *Shercliff v. Cooper*.....774

Revival.

13. A judgment entered of record after the expiration of the judge's term of office is a nullity, and the subsequent action of the legislature can not revive a judgment that has been abandoned or merged into another. *Smith v. Browder*.....701

Redemption.

14. Where the right to redeem land was in the wife and the husband as tenant by curtesy, and the wife died before the expiration

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JUDGMENT—Continued.

of the term for redemption, leaving as her only heir an infant, the right of redemption passed to the heir, and the heir's infancy prevented the running of the statute of limitations. *Henry v. Jones*.....378

Pleading—Admission.

15. Defendant's failure to answer, in a suit on a judgment, was an admission of the allegations in the petition that such a judgment was rendered, and cured the defect, if any, in the record filed with the petition. *Follis & Thatcher v. Proctor & Gamble*.....649

Setting Aside.

16. Where no appeal was prosecuted from a judgment, it was not within the power of the circuit court, at a subsequent term, to set it aside, nor to refuse to permit it to be enforced according to its spirit. *Flournoy v. Morris*47

Vacation.

17. Unless one or more of the grounds embraced in Sections 579-373 of the Civil Code of Practice are set forth in the petition to vacate the judgment, the court has no jurisdiction of the case. *Whitesides v. Brien's Ex'r* 11

JUDICIAL NOTICE.

Terms of Court.—See Evidence 1.

JUDICIAL SALES.**Proceeds Of.**

1. The proceeds of a judicial sale can not be diverted from its adjudged destination. *Flournoy v. Morris*..... 47

Exception to Report.

2. The creditor and not the debtor is the party to except to report of sale on account of the failure of the purchaser to execute a sale bond. *Flournoy v. Morris*..... 47

Improvements on Land.

3. Where only an undivided interest is sold at decretal sale, the charge for permanent improvements, made after the confirmation of the report, must be proportioned according to interest in the land. *Sanders' Heirs v. Sanders*.....287

4. The purchaser at a decretal sale is entitled to pay for permanent improvements put on the land after the confirmation of the sale, to the extent that such improvements enhance the selling value of the land. *Sanders' Heirs v. Sanders*.....287

Worthless Property.

5. Although the title to property sold under a fieri facias be absolutely worthless, yet the right of the plaintiff to the money is not impaired thereby. *Hughes' Adm'r v. Craig*.....475

Exempt Property.

6. In view of the fact that the court's commissioner was the trustee selected by the debtor to sell his estate and apply the proceeds to the

[References are to Pages.]

JUDICIAL SALES—Continued.

payment of his debts, it was not improper that he should be intrusted with the duty of setting apart to the heirs and distributees of the debtor such property as was exempt from execution, nor that he should be permitted to make a division of the land. *Jones v. Robinson, Trustee*371

Amount of Sale.

7. The fact that the property did not sell for an amount sufficient to satisfy the prior lien does not prove that, upon a second sale, after the rights of all the parties shall have been adjudicated, and bidders can be assured that the title they are asked to take can never be disturbed, a larger amount may not be realized. *Hazelrigg v. Williams*353

Title to Land.

8. The sale under judgment to enforce his lien was an unconditional and absolute sale of land not incumbered, after the legal title passed to M., and consequently not embraced in the provision of § 1, Article 15, Chapter 36, 1 R. S. 488, and that sale having been confirmed and a conveyance made to J. for the land, his title to it was thereby perfected. *Jones v. Hopper*379

Encumbered Property.

9. Encumbered property must not be sold until all the parties having claim thereon are before the court. *Hazelrigg v. Williams*....353

Assignment of Bid.

10. Where a purchaser at a judicial sale assigns his bid to another, the contract is fully performed upon the execution of the conveyance by the commissioner to the assignee. *Hanley v. Whipps*.....366

Discharge of Judgment.

11. The bond of the purchaser and the return of the officer that he has sold the property, and taken such bond, completely discharged the judgment and stands in lieu of it, and as between the creditor and debtors is a complete discharge while it remains in force. *Hughes' Adm'r v. Craig*.....475

Setting Aside.

12. Irregularities which do not affect the substantial rights of the parties are not sufficient to set aside a sale made under a judgment where the confirmation is made without objection. *Jones v. Robinson, Trustee*371

Indemnity of Purchaser.

13. Where land is sold under a judgment, and a deed of conveyance made, the purchaser, upon the discovery of the fact that some of the parties were not properly before the court, is entitled to indemnity against a partial eviction by the holders of the unconveyed title. *Kawkins v. Hennig & Speed*.....533

14. When a defendant constructively summoned has not been kept away by unavoidable accident or casualty, and no fraud or miscon-

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JUDICIAL SALES—Continued.

duct on the part of the plaintiff is shown, a judicial sale will not be set aside upon the mere ground that the property did not sell for its full value. *Walden v. Humphreys*.....345

Re-Sale.

15. Where the court had directed the defendant's land to be sold and he was not presumed to know whether the chancellor would approve the sale or not, and this placed him in such a position that he could do nothing but endeavor to obtain as much for his land as it was reasonably worth, and a purchaser could well doubt the validity of his title obtained under a purchaser where the defendant's right to the land depended upon the future action of the court in rejecting or confirming the division, under such circumstances the chancellor should have ordered a resale, as he had a bid of 25 cents per acre in advance of the price bought at the first sale. *Waters v. Cardin*.....707

JURISDICTION.

Reducing Amount.—See Courts 3.

LANDLORD AND TENANT.

Sale of Tenant's Property Under Execution, Notwithstanding Landlord's Lien. See Execution 11.

Sub-Tenant—Liability of Landlord.

1. Where a sub-tenant is in possession with the consent of the landlord, and if without any breach of the terms of the lease, he causes him to abandon the premises, he should be held to the consequences of his own act. *Schurman, Adm'r, v. Jones*..... 97

Covenant of Quiet Enjoyment.

2. A suit can not be maintained by a tenant against his landlord on a covenant of quiet enjoyment where a stranger has trespassed on the premises, unless it is alleged that he was the active agency in the wrong. *Campbell v. Maupin*.....250

3. In the absence of a contract on the part of the assignor of a lease to be responsible for the title of the lessor, or to keep the assignee in possession of the premises during the continuance of the lease, no obligation on his part can be implied from the assignment of the lease. *Hackett v. Schad*.....538

Burden of Proof.

4. Where appellant entered upon the possession of the premises as tenants of appellee, and for some time paid him rent for the same at an agreed rate per month, the burden is on her to establish that she had changed her relation as tenant to that of purchaser. *Williams v. Daley*344

Sale During Term of Lease.

5. Where both the purchaser of land and the assignee of the lease thereon were informed of the circumstances attending the conveyance and the lease thereof, the court should not adjudge the purchaser the

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LANDLORD AND TENANT—Continued.

possession of the land until the expiration of the lease. *Redmon v. H. C. McGhee*427

Landlord's Lien.

6. The rights of a landlord whose lien is in full force, and who has not resorted to his legal remedies to enforce the collection of his rent, can not be jeopardized by the seizure and sale of the tenant's property under execution. *Burford's Adm'r v. Gaither*..... 52

Landlord's Lien—Waiver.

7. Although appellee had a preferred lien on the goods in the house, as landlord, for the rent, still he might waive that lien and enforce the collection of his debt, as creditor, by an ordinary action, the lien secured to landlords being merely cumulative or ancillary. *Millett v. McGhee, Receiver*608

Assignment of Lease—Undertaking.

8. The only undertaking which the law will imply from the assignment of a lease is that the assignor shall be responsible for the ability of the lessor and his representatives to respond in damage in case of eviction. *Hackett v. Schad*.....538

Vacation Premises.

9. The removal of a tenant does not vacate the premises, as the possession, by operation of law, devolves on the landlord. *Garrett v. Phillips*622

Necessity of Notice.

10. Where the petition alleges that possession had been frequently demanded and refused, and it appears that appellant disowned his tenancy and claimed against the appellees before the institution of suit, such hostile claim upon his part exonerated the appellees from the necessity of giving him notice. *French v. French's Heirs*.....666

LARCENY.

Evidence.

The declarations of a party accused of theft as to the manner in which he may have acquired possession of the stolen property are always admissible in his behalf, where the guilt of the accused is made to turn alone upon such possession. *Carter v. Commonwealth*.794

LAW OF CASE.

Former Decision of Court of Appeals.—See Appeal 54, 55.

Second Appeal.—See Appeal 53.

LEWDNESS.

Indictment.

It is unnecessary to allege in an indictment for lascivious indulgence that the defendant procured evil-disposed persons to meet together if she keeps a house for such purpose and permits such practices. *Mills v. Commonwealth*144

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LIBEL AND SLANDER.

Answer.

An answer to a petition charging slander, stating that defendant "did not speak of and concerning the plaintiff the defamatory words alleged to have been spoken, in manner and form as he has alleged," is a sufficient plea of not guilty. *Skaggs v. Moore*.....788

LICENSES.

Pleading.

In a suit for the restitution of license wrongfully collected, the petition is bad when it fails to allege that the general council enacted no other ordinance on the same subject, and that it failed to adopt and ratify the action of the inspector. *Adams Express Co. v. The City of Louisville*198

LIENS.

Of Purchaser at Tax Sale.—See Taxation 6.

Deposit of Title Papers.

The mere deposit of title papers can not create a lien or operate as a mortgage, as in England, to give one creditor preference over another. *Hughes v. Hughes, Adm'r*.....374

LIFE ESTATES.

Improvement—Compensation.

A tenant for life has no right to compensation for improvements made upon land in which he has only a life estate, and no recovery can be had by the tenant during his occupancy of the land or by his heirs or representatives after his death. *Butler v. Cook*.....195

LIMITATION OF ACTIONS.

Estoppel to Plead Seven Years' Statute of Limitation.—See Estoppel 2.

Pleading Limitations Against Cestui Que Trust.—See Trusts 13.

When Limitations Begin to Run.—See Attorney and Client 6.

Presumption.

1. The statutory bar had become complete before the act was passed, and it is not to be assumed that the legislature intended to revive rights barred at the time of the enactment. *Hamilton v. Barnes*167

Fraud.

2. Relief for fraud or mistake must be commenced by action within five years after the cause of action accrues, and the cause of action is not deemed to have accrued until the discovery of fraud or mistake, provided it is brought within ten years after making of the contract. *Jones v. Talbott's Adm'r*.....37

Usury.

3. Where more than three years have elapsed from the payment of the debts before the administrator made an effort to reclaim the

[References are to Pages.]

LIMITATION OF ACTIONS—Continued.

- usury included in the notes, the plea of the statute of limitations is a complete bar. *Bowman v. Bowman's Adm'r*205
- Promise to Pay.**
4. A mortgage executed by a majority of the trustees of the church is not only a direct recognition of the debt, but is an unconditional promise to pay it, and the statute of limitations can not be made available as a bar to recovery. *Trustees of North Episcopal Church v. Chambers*346
- Action on Note.**
5. Where a bank did not, within seven years after a cause of action accrued on a note, appropriate a balance of the maker's money to the payment of the note, the plea of limitations is a bar to an action thereon. *Commonwealth v. Page's Assignees & Bank of Kentucky*....190
- Reply.**
6. A reply to a plea of limitations is only permitted where there is a counter-claim or set-off by the defendant in his answer. *Slack v. Rowlhac*101
- Instruction.**
7. Where the jury may have believed, from the evidence, that appellants were merchants, and also that they were manufacturers, and sold the caps as manufacturers and not as merchants, the instruction should have been made complete by saying to them that if they believe these facts from the evidence, the plea of the statute of limitation was unavailing. *C. S. Rankin & Co. v. Chenerworth*.....515
- Non-Resident.**
8. If appellee left the state of Arkansas before the statutory bar became complete and became a resident of Kentucky, he can not avail himself of our statute, until he has resided here the full term of five years after giving our courts jurisdiction of his person. *Kitnel v. Higgins*500

LIS PENDENS.

How Created.

A lis pendens is created, as to specific property sought to be subjected to the payment of particular debts, by the commencement of an action for that purpose. *Talbott v. Phillips & Scally*401

MALICIOUS PROSECUTION.

Probable Cause—Definition.

Probable cause, being a question of law as well as of fact, should be defined by the court in its instructions to the jury. *Hart v. Smithson*470

MANDAMUS.

To Compel Subscription for Railroad Stock by County Court.

1. Where a proposition to subscribe to the capital stock of a railroad has been authorized by an act of the legislature and a majority

[References are to Pages.]

MANDAMUS—Continued.

voted in favor of the proposition, it is imperative on the county court to subscribe for the stock, and upon failure to do so mandamus is the proper remedy. *Cumberland & Ohio Railroad Co. v. Shumaker*....209

2. Where a majority of the voters pronounced in favor of the proposition of subscribing for railroad stock, nothing remained to be done by the county judge except to subscribe for the stock, and in doing so he acts as a ministerial, and not a judicial, officer, and can be compelled to discharge the duty imposed on him by a writ of mandamus. *Presiding Judge of Washington County Court v. Cumberland & O. R. Co.*519

MARRIAGE.

Marriage of Executrix—See Executors and Administrators 1.
Of Debtor and Creditor.

1. The marriage of a creditor with her debtor releases the debt in law, on the principle that husband and wife are one person, but equity so far qualified this rule as to permit a feme sole to hold and enjoy her property. *Evans v. Leech, Ex'r*654

Breach of Marriage Contract.

2. Where appellant alleges in his answer that appellee was before and after the date of the alleged and pretended contract of marriage guilty of lewd and lascivious conduct, such as showed her to be unchaste and unfit for a wife, of which he had no knowledge at the times specified, and all of which was against his consent, the words lewd and lascivious each import not only great moral delinquency but the actual unlawful indulgence of lustful passions, and such indulgence by one of the parties to a contract to marry, without the procurement or fault of the other, would present a sufficient legal excuse for the refusal of the party not in fault to execute the contract. *Squires v. Hancock*767

3. An agreement to marry is like all other agreements in which the undertakings of the parties to it are to be performed at the same time, and where the obligation and duty of either to perform his or her undertaking necessarily depends upon the concurrent performance of the other, cannot, of course, be carried out except by the mutual consent, good faith and contemporaneous action of both the contracting parties; and, hence, neither party can be said to be in default or guilty of a breach of such agreement to marry the other unless the other is ready and willing to be married at the time and place agreed upon. *Squires v. Hancock*767

MECHANICS' LIENS.**Railroad—Earthwork.**

1. The mechanics' lien law of February 17, 1858, does not apply to work and labor performed in the erection of the earthwork of a railroad track, since the mere earthwork of a railroad cannot be regarded as a structure in the sense that the term is used in the act. *Hagan v. English & Murphy*467

[References are to Pages.]

MECHANICS' LIEN—Continued.

Conveyance of Property.

2. Where, at the time the improvements were commenced, the legal title was in the husband, who retained it until after the greater part of the materials and the most of the work had been done, a conveyance to the wife could not defeat the lien. *Cress v. J. B. Montgomery & Co.*154

MORTGAGES.

Deposit of Title Papers Cannot Operate as a Mortgage—See Liens.

Assignment of Mortgage Note.

1. The benefit of the mortgage passed as an incident when the notes they secure are assigned, but the legal title remained in the mortgages, and he is a necessary party to an action for its foreclosure. *Chambers v. Wool Growers Bank of Newark, Ohio.*.....758
2. The assignees of mortgage notes are the beneficial owners of the mortgage executed to secure their payment, but they are not vested with the legal title thereto. *Chambers v. Wool Growers.*..758

Burden of Proof.

3. The burden of proof is on the grantor in a mortgage to show the property to be a separate estate, in order to exempt it from the operation of a mortgage. *Passmore v. Wilson*436

Inadequacy of Price.

4. The inadequacy of the purchase price should have a controlling influence on the chancellor in determining whether a deed, absolute on its face, was not intended by the parties to be a mortgage. *Justice v. Martin*60

Loss Of—Liability.

5. Appellant obtained control of the mortgage by the assertion of an unfounded claim against the estate of his father, and is, therefore, responsible for the loss of the debt by reason of not instituting a suit to collect it in the lifetime of the mortgagor. *Smith v. Smith's Heirs*166

MOTIONS.

Misjoinder of Parties Must be Taken Advantage of by Motion to Strike Out—See Parties 3.

Waiver of Error.

- If a proceeding by motion is erroneous, appearance to the motion and making the same defense that could have been made in a suit on the bond in question, constitutes a waiver of such error. *Cecil v. Gardner*21

MUNICIPAL CORPORATIONS.

Special Judge of Police Court—See Judges 2.

Ordinance—Presumption.

1. An ordinance passed by a city council must be presumed prima facie to have been passed in accordance with the charter. *Guthrie's Ex'rs v. Stevens*360

[References are to Pages.]

MUNICIPAL CORPORATIONS—Continued.**Streets and Alleys—Improvements.**

2. Where work is done on an alley the city is not liable, whether the alley is a private or a public one, the adjacent land owners being liable if the work was done on a public alley. *City of Louisville v. Humphrey*458

Street Improvements—Ordinance.

3. The ordinances, resolutions and the contracts under which a lien is created upon abutting lots, for payment of the expense incurred in grading, paving and curbing a street, must pursue the charter of the city with strictness in order to give them legal validity. *Johnson v. Obet*688

4. In an action to recover price of street improvement against the owners of property fronting on the street, the ordinance under which the contract was made, and also copies from the journals of the two branches of the general council, showing the proceedings of that body had upon the adoption of such ordinance, must be incorporated in the petition. *City of Louisville v. Stein*25

5. Where there is an irregularity in the adoption of a city ordinance for street improvement, the city is liable to the contractor for the price of the work, as a matter of law. *City of Louisville v. Stein*....25

Street Improvements—Liability of Abutting Property.

6. As the contractors complied with the contract to improve the street in front of defendant's property, it does not afford any grounds of complaint that the city council did not ascertain the names of the lot owners and the exact fronts of their lots and make the assessment specific in amount against each lot as there was no change in the ownership to the lot in question since the work was begun. *Sinclair v. Boyle*291

Improvements—Lien—Judgment.

7. As the statute gives to the appellee a lien on the property improved for the cost of improving it, and as that is the only relief sought, and the only remedy to which he is entitled, it was error to render a personal judgment against appellant. *Guthrie's Ex'rs v. Stevens*360

Improvements—Estoppel.

8. Where petition was signed by a majority of the owners of the front feet requesting the city to improve a street, and appellant, who was one of the signers of the petition, stood by and saw others expend their money on the improvement and made no objection thereto until he was called upon to pay his proportional part for the work, by his acquiescence in the improvement he is estopped to deny his liability. *Galbaugh v. Woods and City of Covington*471

Assessments.

9. The journal being silent as to the suspension of the rule requiring the ordinance to lie over, the presumption is that no such action

[References are to Pages.]

MUNICIPAL CORPORATIONS—Continued.

was taken, and such irregularity is sufficient to exonerate a property owner from paying a street improvement assessment made against him. *City of Louisville v. Stein*.....25

Trespass or Tort.

10. A municipal corporation is responsible for damages for a trespass or other tort, if it commands it to be done or sanctions or approves the act when committed. *Ruhl v. City of Louisville*578

Pleading.

11. The petition is defective in failing to allege that Johnson had notice of the passage of the ordinance by the council to repair the streets, nor are facts alleged showing the failure of the city council to take such action as to make the appellee liable for the work. *Smith v. Johnson*97

Evidence—Documentary.

12. The journals of a city council kept in conformity with law, like legislative journals or the order book of a court, constitute the only competent evidence of what was actually done by the council, and if properly kept are conclusive upon the subject. *Johnson v. Obet*..688

Taxation.

13. Although, at the time of the assessment of the real estate of appellant for taxation, it was not within reach of particular city privileges, such as water, gas and regular police protection, and was used for farming, grazing and horticultural purposes only, these facts alone are not sufficient to exempt the same from taxation for city purposes. *Robinson v. City of Louisville*289

14. In the imposition of a specific tax the city authorities must pursue, strictly, the grant of power under which they act, and the rule of uniformity and equality of taxation, whether it be general or local, should not be disregarded. *The Harmony Society v. City of Louisville*541

15. Where the boundary of a town was extended so as to include the dwelling house and farm lands of appellee, which was used for agricultural purposes only, and no streets or lots were laid off on such land or on adjacent lands, and the trustees of the town attempted to collect taxes on appellee's property included in the extension, it was held that the legislature could extend the boundaries and include the adjacent lands, without the consent of the owner, but that such extension of territory does not necessarily carry with it the power of taxation, but the police authority of the town may extend over the new territory for its protection. *Trustees of Town of Richmond v. Walker*277

NEW TRIAL.

Death of Presiding Judge.

1. Where the judge presiding at a trial died without disposing of a motion for a new trial, and his successor granted a new trial with-

[References are to Pages.]

NEW TRIAL—Continued.

out any knowledge of the evidence adduced on the trial or of the rulings or instructions of the court, and a verdict and judgment were rendered on defendant on the second trial, a reasonable and fair presumption should be indulged in favor of the correctness of the finding of the jury and the action of the court in supervising the trial, and a new trial should not be given without knowledge or information as will enable the court to exercise a sound discretion in determining the question involved. *Mattingly v. Louisville & N. R. R. Co.*132

Newly Discovered Evidence.

2. Where the appellant proved on the first trial that A., in payment for the hogs sold to him, was to lift the note due appellee, and by the newly discovered testimony he seeks to establish the fact that he received the hogs in payment of the note, and that under his authority as agent he had the right to do so, the most liberal practice will not authorize a new trial to enable the applicant to contradict what he has proven on the first trial. *Bonar v. Arnold*227

3. New trials will not be granted upon the discovery of testimony, either oral or written, tending merely to impeach a witness or to show that he was mistaken in his statements. *Merrit v. Moss*609

Newly Discovered Evidence—Diligence.

4. Where it is not alleged that the witness did not, when his deposition was given, recollect every fact connected with the transaction, and no reason is given why such facts were not then elicited, except that appellant's attorney did not know that he could make such proof by the witness and, therefore, failed to examine him in reference to these facts, such diligence as would authorize a new trial is not presented. *Foster v. Shreve*152

5. Where it is not shown that effort was made to discover the evidence alleged as the basis of a new trial, before the original trial, nor that the evidence it produced would cause a different result, chance will not interfere with the judgment at law unless the evidence discovered is such as would change the verdict. *Stegar's Adm'r v. Perkins*736

Surprise.

6. Where defendant's want of knowledge as to the month in which the court would sit resulted from his failure to read the summons, his want of diligence is so palpable and culpable as to deny him the right to new trial. *Walker v. Brown*734

Discovery of New Defense.

7. Where on reversal and return of a case, the defendant does not claim that he discovered the defenses he seeks to set up since the first trial, a new trial cannot be awarded. *Cridger v. Smith*776

Granting as to One Party.

8. Where the liabilities of the parties are several as well as joint, a new trial may be granted as to one and the verdict allowed to stand as to the others. *Hamilton v. Barnes*167

[References are to Pages.]

NEW TRIAL—Continued.

Pleading.

9. The petition in an action for a new trial must state the grounds of defense so that it may be determined from the pleading whether or not the newly discovered evidence is material. *McAllister v. Cochran*615

NON-RESIDENT.

Appeal By—Appearance—See Appeal 8.

NOTICE.

Private Statute—See Statutes 3.

NUISANCE.

Obstruction of Highway.

1. The obstruction of a public highway is a public nuisance. *Doak v. Wakefield*651

Public Nuisance—Action—Parties.

2. A public nuisance is not the subject of a suit by a private individual unless he has sustained some special injury thereby. *Doak v. Wakefield*651

OBSTRUCTIONS.

To Highway—See Highways 1.

PARENT AND CHILD.

Improvements by Parent on Land Owned by Son—See Fraudulent Conveyances 6.

PAROL CONTRACT.

For Indulgence—See Contracts 9.

PARTIES.

County Proper Party in Proceeding Against Sheriff for Taxes Collected—See Taxation 5.

In Action to Subject Property Fraudulently Conveyed—See Fraudulent Conveyances 9.

Mortgagee Necessary Party in Foreclosure Suit by Assignee—See Mortgages 1.

Husband and Wife.

1. The husband must be a party to a suit before a judgment can be rendered against the wife. *Edwards v. Craddock*49

Misjoinder—Objection.

2. If there is a misjoinder of parties in the petition, the objection must be made in the circuit court. *Shackleford v. Austin*318

Misjoinder—Motion to Strike Out.

3. A misjoinder of plaintiffs in the lower court or of appellants in the Court of Appeals must be taken advantage of by motion to strike out the name of the party improperly joined. *Shercliff v. Cooper*..774

[References are to Pages.]

PARTIES—Continued.**Enforcement of Liens.**

4. All persons who by apportionment are to pay any part of the cost of improvements, for which liens are given, shall be made parties to proceedings for the enforcement of such liens, unless they have paid their part of the cost agreeable to the apportionment, which fact shall be alleged in the petition. *Heheman v. Snead*439

PARTITION.**Allotment of Shares.**

1. To allot each share entirely remote from each other, or to divide the land so as to increase the fencing necessary to enclose the lots, should be avoided, if possible. *Bell v. Farris*247

Joint Allotment.

2. Where parties are entitled to two or more shares in the same tract of land, these shares should be allotted together if it can be done without doing injury to the others interested. *Bell v. Ferris* ..247

Estoppel.

3. A party who has joined in a suit for partition cannot afterward be heard to say that the property belonged to another party. *Robbins v. Robbins*390

Instruction.

4. The court should not, by refusing to instruct, deprive the jury of the right to deduce from the facts proven the conclusion that the offense committed, if any, is of a lower grade than that charged in the indictment. *Carter v. Commonwealth*777

PARTNERSHIP.**Insolvency.**

1. An act by which a partnership is declared insolvent does not necessarily affect the individual estate of the partners and can be made to apply alone to the firm and not the individual members thereof. *Higgenson's Ex'rs v. Fitzhenry*84

Evidence of Partnership.

2. The fact that S. was the half owner of the house in which the business was conducted, and he was in the habit of aiding the firm to raise money for the purpose of purchasing tobacco, tends to prove that he was a partner in the business. *Smith v. Watkins & Stokes*.....383

Asserting Lien on Individual Estate.

3. There is no equitable principle by which one can assert his lien upon the individual estate of the partners and then claim the benefit of the partnership effects; but he must be content with what he has realized out of the individual property until the partnership creditors are made equal out of the partnership property. *Higgenson's Ex'rs v. Fitzhenry*84

[References are to Pages.]

PARTNERSHIP—Continued.

Estoppel of Partner.

4. Where one partner pays his individual debts with partnership funds, the other having knowledge of the fact, is thereby estopped to recover of the individual creditor the amount so paid. *McKee v. Land*114

Interest.

5. Where by the terms of a partnership, each partner was to contribute equally to the capital and one partner paid in more than the other, he is entitled to interest on the access, upon settlement of the partnership. *Rosseau v. Falkener*.....255

Memorandum of Settlement.

6. The written memorandum of the settlement of a partnership, executed by both parties, is prima facie a full settlement of all the accounts between the parties at the time the paper was signed. *Green v. Pullins*.....362

Protection of Rights of Partners.

7. A court of equity will not protect or enforce the rights of a partner as against those who have acquired the partnership effects in good faith, where for the period of two years and longer he stands quietly by and permits innocent parties to deal with his partner as if he was the sole owner of the property, and the court will not, after this long acquiescence on his part, hunt up partnership moneys invested in real estate to which another has the legal title. *Land v. Land*.....461

Reference to Master of Partnership Accounts.

8. Inasmuch as the existence of the partnership was denied by appellant and his contention was sustained by the court, there was no reason why the cause should have been referred to the master for a settlement of the accounts between the parties. *Jesse v. Dulin & Wife*558

Liability on Note or Account.

9. Appellant could not repudiate the note because it was executed after the dissolution of the firm, and also rely upon it as a bar to the action on the account. *Greer v. Fleming*.....661

Consideration.

10. Where the appellee obligated himself to credit the note sued on with any funds belonging to the firm, which he had appropriated to his own use and had not charged himself with, or with which he had not been charged, the consideration was therefore a valuable one. *Gaggin v. Barnes*684

Release from Liability.

11. If, at the time of dissolution of partnership, appellant did not know that certain partnership funds had been used by appellee, he can not be presumed to have intended to release appellant from a responsibility which appellee did not then know existed. *Gaggin v. Barnes*684

[References are to Pages.]

PARTY WALLS.

If appellant's vendor sanctioned the erection of the partition wall, he can not occupy a more favorable position than he might if he had not conveyed the property. *McLaughlin v. Howard*.....443

PAYMENT.**Application of Credit.**

1. Where among the vouchers found in the record is a check dated Louisville, April 1st, 1865, drawn by H. in favor of J., for one thousand dollars on hay and corn, and also a receipt signed by J., dated Louisville, April 1st, 1865, to H. for W. and H. for one thousand dollars on hay and corn, the coincidence of date, amount, person to whom paid and for what paid, expressed in the same words, and in the same order, show that the receipt was for the identical sum for which the check was drawn. *Ward v. Claxton & Jones*.....314

Amount of Credit.

2. The entering of a credit of \$500.00 or note under the erroneous belief that the crop of tobacco when sold would net that amount does not commit the creditor to that amount of credit. *Patterson v. Field*393

Misapplication of Credit.

3. When a debtor fails to direct how a payment shall be applied and his creditor applies it to the wrong debt, he can not be heard to say that this mistake exonerates him from paying the debt sued on. *Hamilton v. Barnes*.....167

Payment in Confederate Money.

4. A payment on a note in confederate currency, made and accepted within the military lines of the confederate states, is valid. *Hazelrigg v. Prater*482

Burden of Proof.

5. Where a payment has been proven, it is incumbent on the plaintiff to show by proof that he had another debt against the defendant to which it was applied. *Roberts v. Ketchen*.....254

PERPETUITIES.**Restriction on Power of Sale.**

Where one purchased land at judicial sale as trustee for another who was restrained from selling the land by the will of her mother, neither the judgment and confirmation of the sale, nor the purchase, will operate to move or effect such restriction on the power of sale. *Sanders v. Douglas*150

PLEADING.**Petition.**

1. Where a petition on its face shall contain a statement of the facts constituting a cause of action and the writing, which is the foundation of the action, it does not obviate the necessity of setting forth in the

[References are to Pages.]

PLEADING—Continued.

petition so much of the writing as will show by reason of the alleged acts, or omission on the part of the defendant, that the plaintiff is entitled to relief. *Commonwealth v. Moore*.....740

2. A commissioner's report can not help an imperfect and defective petition. *Trimble, Adm'r, v. Hensley*.....730

3. Construing the petition most strongly against the pleader, it is clear that upon the statement of facts as to the mortgage, judgment and decretal sale under which appellee acquired possession, appellants are not entitled to the relief sought, and the demurrer was properly sustained. *Jenks v. Irwin*.....562

4. A petition founded on a written obligation should state so much of the contract as to show the plaintiff entitled to a recovery by reason of the breach or the nonperformance of the undertaking by the defendant; and this requirement will not be dispensed with by the mere exhibition of the writing or a statement of the plaintiff's own conclusions of law as to its effect. *Burbridge v. Varnon*.....244

5. Where appellant, in his amended petition, admitted that he was not the owner of the horse he traded but had general permission to trade him, such statements are only conclusions of the pleader and not a statement of such facts as would divest the owner of the title to the horse. *Barber v. Moore*.....192

Answer.

6. As the debts of the appellee existed before the execution of the mortgage, the allegation in the answer that appellants were about to attach the property of K., and that the mortgage was given to prevent them from taking such proceedings to secure their debt, was not sufficient, and demurrer was properly sustained. *Kane v. Adams*.....557

7. The defendant must deny all the allegations of the petition which he intends to controvert, and in addition thereto he must deny any knowledge or information of said allegations sufficient to form a belief as to their truth, a want of knowledge or information not being sufficient. *Hodge v. E. H. Morin & Co.*.....363

8. Where appellees alleged in their petition that in April, 1870, a suit was pending in the court below, in which they were plaintiffs and appellants were defendants, in which the sufficiency to the title to the land and the quantity contained in the tract were directly in issue and that a consent judgment was rendered by which the appellants withdrew so much of their answer as set up a defect of title and deficit in quantity and to accept the deed then tendered them, and that said deed was thereupon delivered to and accepted by them and these allegations are not controverted by the answer in this suit; but they allege in their amended answer that if the deed was accepted by them, it was done by mistake, as to its purport, on their part and that the deed contains exceptions which were not fully understood; the answer was insufficient and presented no bar to this action, and as the matters set up in the amended answer were being litigated between the same

[References are to Pages.]

PLEADING—Continued.

parties in another suit in the same court, the judge did not err in refusing to permit it to be filed. *Roberts v. McKinney & Bros.*.....293

9. To constitute a good answer every material allegation of the petition must be denied in such a manner, or if facts are pleaded in avoidance, they must be so stated as to show that if true the plaintiff is not entitled to a judgment. *Baum v. White & Hunt.*.....193

10. When an answer is silent and evasive and the proof unsatisfactory, the plaintiff is entitled to the relief sought. *McBean v. Richey*146

Defense.

11. Where a defense is purely personal it can not be made to operate in favor of another party. *Hamilton v. Barnes.*.....167

12. A defense that defendant had a right to retain the proceeds of the property sued for, under and by a contract with plaintiffs by which they agreed that if he would abandon the prosecution of an appeal from a judgment by which his property was confiscated, they would make good an agreed proportion of his loss by reason of such judgment is not available. *Richards v. Whitlock & McNichol.*.....299

Cross-Petition.

13. Where the answer and cross-petition allege that from the death of R., Sr., till September, 1867, the plaintiff, E., and her two sons, R., Jr., and J., had the possession and use of the share of the defendant, A., in the real estate of her father, and that the use of it was worth one hundred and twenty dollars per annum, it falls to allege either a joint renting or occupancy, or a joint obligation to pay the rent, since the allegations of the cross-petition may all be true and yet the appellee may have had the use of some inconsiderable portion of the land, separate from her sons. *Tolls & Wife v. Soward.*.....274

Exhibit.

14. Where the right to property is based on written memoranda filed and made a part of the petition, these exhibits must be considered on demurrer and must control any statement in the pleading inconsistent with their terms and legal effect. *Chas. Brown & Co. v. W. J. Arnold & Co.*236

15. Although an exhibit is withdrawn and not refiled, if it is recognized and treated by both parties and the court as a legitimate part of the defense, without objections, the irregularity will be regarded as waived. *Howard v. Hunter.*.....535

Demurrer.

16. Although the court might have properly sustained a demurrer to an insufficient petition, it may, on the submission of the case, render a judgment for the defendants. *Burbridge v. Varnon.*.....244

Amendment.

17. Where an amended petition filed was still pending when the defendant offered to file his answer and cross-petition thereto, and the lost pleading was such, if true, as to authorize the relief it sought as a

[References are to Pages.]

PLEADING—Continued.

cross-petition as well as to constitute a defense to the plaintiff's claim to further relief than had already been adjudged, the court should have allowed the answer to be filed, although the plaintiff had dismissed his amended petition. *Grief v. Maks*.....377

18. The court does not abuse its discretion by refusing to permit an amended answer to be filed, on the conclusion of the evidence, which sets up a defense already plead in the original answer, or facts known to the defendant when he filed his original answer. *Smith v. W. H. Sanford & Co.*.....280

19. An amended answer after the return of a case from the Court of Appeals can not be regarded as an original pleading or an appropriate petition for reviewing or rellitigating the questions involved by the decision of the Court of Appeals, and which by the mandate the Circuit Court was required to carry into effect. *Small v. Bryland*..431

20. A court does not abuse a sound discretion by rejecting an amended pleading where the judgment must be the same as if the amendment had been filed. *Chappell v. Sudduth*.....57

21. Where the court refuses to permit new issues to be formed, amendment of pleadings is the proper procedure. *Cruch v. Smith*...72

22. Where a petition is so amended as to present a new cause of action there should be service of process, either actual or constructive, before judgment. *Cheek v. McKay*.....199

Bill of Particulars.

23. The depositions of the witnesses who prove a general admission or rather not a specific denial of the account when the parties were endeavoring to make an amicable settlement, is not sufficient to dispense with a bill of particulars when it was demanded, and especially when the only item named constituted an insignificant part of the claim. *Donnelly v. Hill*.....792

Conclusion of Law.

24. The averment that the provisions of the constitution were not complied with by the General Assembly upon its final passage of the act of incorporation is a mere conclusion of law, set up by the pleader. *Presiding Judge of Washington County Court v. Cumberland & O. R. Co.*519

25. Facts from which conclusions of law are drawn, and not the conclusions themselves must be pleaded. *Presiding Judge of Washington County Court v. Cumberland & O. R. Co.*.....519

Election.

26. Where plaintiff alleged, in substance and effect, that he had endeavored, in good faith, to clear the title of doubts as to its validity, but had found it impossible to do so; and these facts being confessed by the demurrer and failure to answer, the court properly required the defendant to elect. *Haslett v. Marker*.....532

27. The plaintiff, having deliberately elected to proceed upon the second paragraph to his petition, it was not an abuse of the court's dis-

[References are to Pages.]

PLEADING—Continued.

cretion to refuse to permit him, after the testimony was heard, to amend his pleading and rely upon the matters set out in the first paragraph of his original petition. *Goodson v. Stephens*.....664

Setting Aside Order Taking Petition as Confessed.

28. Where a portion of the defendants on whom process was executed was not bound to answer until the summons was fully served, it was not error to set aside the order taking the petition for confessed as to a part of the defendants after process had been fully served, and when they presented an answer containing a substantial defense, the order taking the petition for confessed being merely interlocutory. *Vaught v. Sandford*.....696

POSSESSION.

Constructive—Delivery of Key to Dwelling.—See *Vendor and Purchaser* 4.

PRESUMPTION.

- As to Alteration of Note.—**See *Alteration of Instruments*.
- As to Approval of Sale by Chancery.—**See *Judicial Sales* 15.
- As to Interest for Indebtedness Incurred in Another State.—**See *Interest* 2.
- As to Order of Court Directing Sheriff to Take Charge of Prisoner.—**See *Criminal Law* 2.
- As to Payment of Balance of Note.—**See *Bills and Notes* 15.
- As to Residence of Party.—**See *Courts* 4.
- As to Ruling of Court on Exception.—**See *Appeal* 10.
- As to Suspension of Rule Requiring Ordinance to Lie Over.—**See *Municipal Corporations* 9.
- Constitutionality of Statute.—**See *Statutes* 2.
- Discharge and Reinstatement of Attachment.—**See *Attachment* 15.
- Execution of Bond by Sheriff.—**See *Sheriffs and Constables* 2.
- Intention to Become Bound as an Endorser or Guarantor.—**See *Bills and Notes* 5.
- Merger of Indebtedness Into Note.—**See *Bills and Notes* 12.
- Of Delivery of Written Instrument.—**See *Contracts* 5.
- Of Prejudice.—**See *Appeal* 9.
- Passage of Ordinance.—**See *Municipal Corporations* 1.
- Payment of Arrears to Widow.—**See *Army and Navy*.
- Term of Sheriff and Bond.—**See *Sheriffs and Constables* 4.
- That Judgment is Sustained by Evidence.—**See *Appeals* 28.
- That No Debt Will Come Against an Administrator After the Lapse of Five Years.—**See *Executors and Administrators* 3.
- That Sale by Debtor is Fraudulent.—**See *Fraudulent Conveyances* 4.

PRINCIPAL AND AGENT.

Accounting for Profits.

1. Where appellant as agent of the appellee sold the tobacco in Europe and received in payment therefor sterling exchange, and this was converted by him into the currency of this country, the exchange

[References are to Pages.]

PRINCIPAL AND AGENT—Continued.

- bringing a large premium, the appellant should account to the appellee for the profits derived by him from the sale of the exchange; since it was not his money or property, but that of his principal, and any speculation indulged in by him in the way of exchanging this currency for greenbacks must be accounted for. *Burbank v. Ogden*.....73
- Suit Against Co-Surety.**
2. A suit can not be maintained by a surety against a co-surety without alleging that the principal is insolvent and that he failed to pay the obligation. *Oldham v. Price*.....95

PRINCIPAL AND SURETY.

Creation of Liability.

1. One may become surety for another by an obligation separate and distinct from the one executed by the principal. *Abell v. Scott*.....238

Duty of Surety.

2. Where the property of the principal is sold under execution, it is the duty of the surety to make it bring its value, if he desired to be relieved from liability. *Tuck v. Ogburn*.....326

Condition Precedent to Delivery.

3. Where a principal obligor was the agent of his surety to sign his name to the note and deliver it, but not to do so until S. signed it, the obligee having no notice of the agreement upon the part of the principal is not affected thereby. *Ragan v. Hudson*.....416

Permitting Use of Name as Surety in Innocent Holder.

4. It is a well-settled principle that if one trusts another with his name as his surety as co-obligor, he must suffer the consequences of his confidence in him, rather than place the loss on the innocent holder of the note. *McClain v. Burton, Mitchell & Co.*.....444

Liability of Surety by Statement.

5. A surety may be bound for the debt of his principal by his statement, although the recovery against him as surety was barred by time. *J. H. & J. W. White v. Bondurant*.....351

Estoppel of Payee.

6. Where the surety offered to give the payee a written notice to sue the principal, but he waived it, saying that he did not require it, and accepted a verbal notice as sufficient, it amounted to an express waiver of his statutory right to require the notice to be in writing, and he is thereby estopped from claiming that the notice there given was not legal and sufficient. *Hollowell v. J. & W. Hodges*.....494

Additional Security.

7. The fact that a creditor's agent took from the debtor a mortgage on a crop of tobacco in the debtor's possession, to secure payment of the note sued on, could not have the effect of increasing the risk of the debtor's wife as surety, nor prevent her from taking steps to indemnify herself against apprehended loss. *Patterson v. Field*.....393

[References are to Pages.]

PRINCIPAL AND SURETY—Continued.**Release of Surety.**

8. Taking the allegations of the answer as true, which is done for the purpose of the demurrer, and regarding the president of the bank as acting officially and as agent of the bank, in the alleged communications by him to the appellants, to the effect that the principal debtor had in some way secured the bank whereby the endorser was induced to part with the property by which they were indemnified, they would be discharged from liability to the bank. *Gardner v. Forbes*.....358

9. Where six months after the maturity of the note the principal paid ten dollars, and the holder agreed to indulge the principal for another six months, and this was continued for every six months up to some time before the institution of the suit; and the partial payments were not credited on the principal of the note, but were the usurious interest charged; the agreement for indulgence was void, and could not be enforced, and consequently it did not suspend appellant's right to sue on the note, nor was the surety thereby released from his obligation to pay the debt. *Millitz v. Schuff*.....118

10. Where indulgence is given the principal at the instance of the surety, a new promise upon the part of the principal debtor to pay usurious interest will not release the surety. *Tuck v. Ogburn*.....326

11. If the creditor and principal debtor make a contract, founded on a valuable consideration, and such a one as can be enforced, for indulgence without the assent of the surety it will operate as a release of the surety. *Wilson v. Davies*.....725

12. The answer must contain such allegations as will enable the court to determine that the relation of principal and surety exists by showing the liability of the party alleged to be the principal in the debt, before a plea of limitation will avail. *Abell v. Scott*.....238

PROCEEDINGS OF COURT.

How Proven.—See Courts 6.

PROCESS.

Amendment Presenting New Cause of Action.—See Pleading 22.

Variance.

1. The note sued on was made payable to the Cincinnati Mates Benevolent Association, and the warrant was taken out in the name of the Mates Benevolent Association of Cincinnati; such variance, if fatal, should have been taken advantage of by motion to quash the writ. *Clinton v. Mates Benevolent Association*.....4

Service—Evidence of.

2. An entry on the common law docket is competent evidence of the service of the summons on defendant. *Moss v. Moss*.....464

Service on Corporations.

3. Where an officer's return is: "Executed by delivering to Joel Lambert a true copy of the within summons," it is not such service on

[References are to Pages.]

PROCESS—Continued.

- the company as is required by law. *Hopkins Mastodin Iron, Mining & Mfg. Coal Co. v. Burbank*.....62
- Service on Agent.**
4. The burden is on the plaintiff to show that the facts exist to authorize service of summons on an agent of defendant, as provided by Civil Code. *Pope v. Forsee*.....566

Appearance.

5. Where the court reversed the first judgment because no summons had been issued and served on the pleadings, yet the prosecution of the appeal by defendants operated as the entering of their appearance, and no service of summons was necessary after the return of the case. *Hagan v. English & Murphy*.....467

Warning Order.

6. To make a warning order valid and effectual, the provisions of the code must be literally followed, and the clerk has the power to warn the defendant to appear on the first day of a term, which does not commence within sixty days after the order is made. *Preston v. Smith*586
7. Where the clerk of the court without authority of law warned the defendant to appear upon a certain day of the term, his action is void and the court has no jurisdiction over the taxed property, and the judgment directing it to be sold is a nullity. *Preston v. Smith*.....586

PUBLIC LANDS.

Statute of Limitations.

1. A junior patentee can not claim possession as against the elder to any greater extent than he may actually hold, and the statute of limitation does not begin to run until actual occupancy. *Emerine & Wife v. Adams*.....83

Actual Possession.

2. The actual possession by the appellees at the time H. made his entry and procured his patent, was enough to put him upon his inquiry as to the nature of their claim. *Hensley v. Holly & Others*...493

PUBLIC POLICY.

- Contract for Services for Release of Obligor from Prison.—See Contracts 3.**
- Contract to Refrain from Selling Liquor.—See Contracts 7.**

QUANTUM MERUIT.

- Recovery Upon, for Services Rendered.—See Contracts 11.**

QUIETING TITLE.

- An action to quiet the title to land can not be maintained in the absence of the legal title or some possessory right upon which the proceedings can be based. *Vaught v. Sandford*.....696

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RAILROADS.**Mechanics' Lien Law Not Applicable to Railroad Embankments.—See Mechanics' Liens 1.****RECEIPTS.****As Proof of Collection of Debt.—See Execution 2.****RECEIVERS.****Bond.**

1. The bond executed by appellant as surety of the receiver was not made payable to any particular person, but it is in substance and effect a bond payable to the commonwealth for the use of the parties named in the bond. *Newman v. Wickliffe's Ex'r*.....605

Authority of Another Court.

2. Where a court has taken jurisdiction over property by the appointment of a receiver, no other court has the power to annul or modify the orders of that court or make that court responsible for money ordered to be paid out by its receiver, although wrongfully paid. *Biggs v. Robinson*.....16

Receiver as Garnishee.

3. A receiver, although summoned as a garnishee in a suit pending in another county, is compelled to obey the orders of the court in which he is acting as such, and can not be made responsible for money paid out by him under the orders of the court, although wrongfully paid. *Biggs v. Robinson*.....16

To Receive Money of Estate.

4. Where a suit is brought by distributees against an administrator for the settlement of the estate, and assets are shown to be in his hands, the court will appoint a receiver and have the money in court for the purpose of more speedily adjusting the rights of the parties and effecting the object of the suit. *Winfrey's Adm'r v. Griffin*....338

REDEMPTION.**Failure to Redeem in Allotted Time.—See Execution 24.****REFORMATION OF INSTRUMENTS.****Description of Property.**

The grantee in a deed is entitled to have the deed so reformed as to correctly describe the property intended to be conveyed thereby. *Lawrence v. Middleton*.....600

RELIGIOUS SOCIETIES.**Limitations as Bar to Debt.—See Limitation of Actions 4.****Power of Trustees.**

1. Under the church discipline, the trustees might have advanced the amount due appellee, and then mortgaged the church property to raise money to reimburse themselves, and from this expressed dele-

[References are to Pages.]

RELIGIOUS SOCIETIES—Continued.

gation of power it may be implied that, with the creditor's consent, they may secure his debt by making the mortgage directly to him. Trustees of North Episcopal Church v. Chambers.....346

Notice.

2. Where it is not alleged in the petition that prior to the partial execution of the deed, the trustees had given the notice to the preacher in charge, or the presiding elder, as required by the Methodist discipline, such paper could not bind the church, nor has the chancellor the right to enforce its specific execution against that organization. Trustees of North Episcopal Church v. Chambers.....346

REPORTS.

Unrecorded Decisions.

The decision of the Court of Appeals in a case may be used as authority, although the decision is not published in the reports of the decisions of the court. Daniel's Devises v. Daniel.....670

RESCISSION.

Of Contract of Sale.—See Vendor and Purchaser 6.

RES GESTAE.

Conversation Not Connected With Principal Act.—See Evidence 6.

REVERSIONS.

Failure of Use.—See Trusts 12.

REVOCATION.

Election to Take Under Will.—See Wills 27.

REWARDS.

Where appellant, at the time, was the sheriff of M. county, and had a bench warrant in his hands for the arrest of the accused, and before the court could certify his right to the reward as required by the statute in such cases, it was proper that the facts should present a case divested of everything like a want of good faith between the sheriff and the state. Greenwade v. Commonwealth.....647

ROBBERY.

Attempt to Rob.

A mere attempt to rob, unaccompanied with an assault with a deadly weapon, or a demand of something of value from the person of another with force and violence, with the felonious intent to commit robbery, is not an offense at common law, nor by statute, nor is it a public offense to carry an ordinary pocket knife concealed, which may be a deadly weapon. Dunning v. Commonwealth.....173

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SALES.**Place of Delivery.**

1. As a general rule applicable to the sale of cumbersome property, the seller's ordinary place of sale, production or manufacture is the place of delivery. *Gardiner v. Price*.....650

Liability of Wife.

2. A creditor can not recover against a wife for goods sold to the husband and daughter without showing that the credit was given to her. *Wood v. Burris & Wife*.....325

Ownership.

3. Where appellees were informed that the goods were not in the possession of the party from whom they made the purchase, it was enough to put them on inquiry as to who was the owner and in what character the seller acted in making the sale. *James Graham & Co. v. Duckwall, Fitch & Co.*.....495

Plea of Fraud.

4. The plea of fraud in the sale of goods can not be made available, where the note was executed after the goods had been received and opened, and after the purchaser had acquired a full knowledge of all the facts connected with the transaction and had received and accepted the goods. *Kenner v. McIntyre*.....527

Estoppel of Purchaser.

5. A purchaser of adulterated whisky is entitled to recover damages on his cross-petition, unless he sold the whisky after he was apprised of its being adulterated, and in that event he is estopped to claim damages. *Smith v. Walker*.....719

Trial—Peremptory Instruction.

6. Whether the contract for the sale of the corn was complete or left something to be done material to complete the bargain were facts, upon which it was the province of the jury to pass and the court erred in giving a peremptory instruction. *Cocanaugher v. Hill*....185

Evidence—Declarations of Seller.

7. The declarations of the seller of lumber, made at the time of sale, are competent as to the question of ownership of the property. *Sowards v. Henderson*.....100

Depositions.

8. Depositions taken by plaintiffs were held inadmissible as evidence in the case to show that at that time defendant was asserting that he and one of the plaintiffs were partners in the purchase of the mules in question. *McElroy v. Dunn*.....112

SCHOOLS AND SCHOOL DISTRICTS.**Assault on Pupil by Teacher.**

- The authority of a teacher to hold his pupil to a strict accountability in school for disorderly behavior does not justify him in assaulting and beating the pupil on the playground. *Hardy v. James*.....36

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SET-OFF AND COUNTERCLAIM.**Applicable to Judgment.**—See Judgment 6.**Counterclaim—What Constitutes.**

1. A counterclaim must be a cause of action arising out of a transaction set forth in a petition or connected with the subject of the action. *Champlin v. Betz & Schraeffenberger*.....231

When Not Available.

2. Where by the terms of a contract M. agreed unconditionally to pay for the completion of a building the sum of \$2,500, and no mention is made of any claim set up, or to be set up by him for old lumber or brick sold prior to that time by the original contractor, the same cannot be set up as a set-off. *McNees v. Parrish*.....616

Against Beneficial Owner of Note.

3. If plaintiff was the beneficial owner of the note sued on, a note held by defendant against him may be set off against the former, even in the hands of the third party. *Soward v. Johnson*.....147

Answer as Counterclaim.

4. An answer setting forth facts sufficient to constitute a counterclaim must be so regarded, although it is not denominated as such. *Champlin v. Betz & Schraeffenberger*.....231

Allegation of Payment.

5. An answer merely alleging payment, presents no cause of action. *Champlin v. Betz & Schraeffenberger*.....231

Set-off Taken as Confessed.

6. There being no denial upon the part of appellants that the set-offs were true, they must be taken for confessed. *Stewart v. Norton*...286

Set-off Need Not Be Pled.

7. The agreed price of the hogs might have been pleaded as a set-off to G.'s claim for damages. but as it constitutes a cause of action complete within itself, appellees were not bound to plead it. *Gless v. Snooks*.....364

When Set-off Can Not Be Pled in Equity.

8. A set-off which could have been successfully pleaded at law can not be plead in a suit in equity. *Kash v. Everett*.....484

Unliquidated Damages.

9. Unliquidated damages growing out of an altogether different transaction can not be pleaded as a set-off. *Lant v. Louisville, Cin- & Lex. Railroad Co.*.....445

Striking Out Set-off.

10. An order striking out all claims of set-off relied on by the parties, which purport to have been done by joint consent, will be upheld on an appeal, in the absence of a motion in the lower court to set it aside. *Shackleford v. Landrum*.....432

Breach of Warranty.

11. The facts set up in the answer amount to a warranty that the stallion was capable of performing services which render horses of

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SET-OFF AND COUNTERCLAIM—Continued.

that kind valuable, and damages for a breach of this warranty could be lawfully set off against the note sued on, even in the hands of the assignee. *Cundiff v. Cundiff*.....759

SHERIFFS AND CONSTABLES.**County Funds—Payment.**

1. Where a sheriff holds the funds of a county and is the proper custodian of the same, he has no right to pay them out except upon the order of the county court. *Adams v. Brown*.....32

Bond.

2. Where a sheriff is re-elected it is the duty of the county court to require him to execute a new bond, and in the absence of proof to the contrary it will be presumed that he has done so, and when he defaults the action must be brought on the bond in force at the time of defalcation. *Commonwealth for Use, etc., v. Johnson*.....202

Bond—Sureties.

3. Where W. and other sureties of a sheriff were induced to believe that the name of B., affixed to the bond before their signatures were attached, was his act and deed, and the same was not his act, and did not bind him, then their own attempted execution of the bond is not obligatory on them. *Chamberlain & Tapp v. W. J. Brewer*.....6

Bond—Presumption.

4. Where the bond sued on was executed in 1866, and the failure to return the execution complained of occurred in August, 1867, it will be presumed that the sheriff entered upon the second term in January, 1867, and that the County Court required him to execute a new bond at that time. *Commonwealth v. Johnson*.....201

Bond—Estoppel.

5. In a suit on a sheriff's bond the defendants are estopped by their own acknowledgment in the bond from denying that the person described therein was sheriff at the date of the bond. *Garrett v. Philipps*624

Failure to Return Execution.

6. It is no defense, on a motion against a sheriff for failure to return an execution within thirty days, that the whole of the execution could not have been made, since the restrictive provision of the statute as to executions against insolvent defendants does not apply. *Litton v. Carty*448

Collection Without Execution.

7. A sheriff has no right to collect money upon a judgment by virtue of his office, and when he does so without first having an execution, his sureties on his official bond are not responsible in case he fails to pay over the money to the plaintiff. *Commonwealth v. Bedford*.....243

Constable—Inability to Collect Debt.

8. Where a constable undertakes to collect a debt and he finds out that he can not do so, it is his duty to return the evidence of the debt,

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SHERIFFS AND CONSTABLES—Continued.

and as he has no authority to select an attorney, if he does so he is responsible for the competency and fidelity of the attorney. *Patton v. Kasson*571

Receipt by Deputy Sheriff.

9. The execution of a receipt by a deputy sheriff is not sufficient to prove the collection of the debt by the deputy, was not an official act binding on the sheriff and his sureties in the absence of proof of the deputy's signature to the receipt. *Griffith v. Hicks*.....687

SHIPPING.

Salvage.

Where a steamboat has been wrecked and set on fire by an explosion of its boilers, any person assisting in extinguishing the flames, thereby saving the property from total loss, is entitled to reasonable salvage. *Sherley v. Martin*.....288

SIGNATURES.

Proof of Signature.—See *Vendor and Purchaser* 11.

SLAVES.

No free negro was capable of acquiring in fee, or holding for any length of time, any slave other than the husband, parent or descendant of such free negro. *Reed v. Reed*.....408

SPECIFIC PERFORMANCE.

Marriage of Vendor and Purchaser.

1. Where the vendee purchased a tract of land by executory contract and thereafter united in marriage with the vendor, whereupon he instituted this suit to compel specific performance of the contract of sale, he is entitled to a specific execution of his contract of purchase of the land. *Honaker v. Honaker*.....543

Payment of Purchase Price.

2. In equity a vendor can not be forced to convey, in conformity with his title bond, until he is paid the full amount of the agreed purchase price for the real estate sold. *Hazelrigg v. Williams*.....353

Pleading.

3. A vendor seeking a specific execution of a contract of sale must allege a readiness and ability to execute on his part and tender a deed with the petition. *Frank v. Carlton*.....653

4. Where appellant states, in his answer, that he has no knowledge or information sufficient to form a belief as to whether or not the title of appellee is good and perfect, and complains that he has never made an exhibition of his title, and he does not point out specific defects in appellee's title, nor does he call upon appellee for an exhibition of such title, it is insufficient, and he should either have denied his ability to convey in pursuance to his title bond or demanded an ex-

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SPECIFIC PERFORMANCE—Continued.

hibition of his title, or else he should have pointed out specific defects in same. *Lockett v. Herndon*.....602

Deficit in Quantity of Land.

5. Where the sale of the land by appellant to appellee was in gross, but they did not contemplate more than the usual rate of excess or deficit, a specific execution of a contract of sale will not be enforced if the deficit is as great as 33 per cent. of the estimated quantity of the land sold. *Wells v. Morris*.....324

STARE DECISIS.

Transactions Which Occurred Prior to Overruling Decision.—See Courts 2.

STATES.**Defalcation of Auditor.**

Where upon discovery of defalcation of the auditor, the state might have asserted claim to the balance remaining in the bank to his credit, but the state waived such right and proceeded against his sureties, it is wrong, after the sureties have been compelled to account for all the money unlawfully appropriated by him, for the state then to compel the surrender of such money. *Commonwealth v. Page's Assignees & Bank of Kentucky*.....190

STATUTES.**Construction.**

1. Statutes in derogation of the general powers of courts of chancery ought to be so construed as not to abridge the prerogative of such courts further than their language manifests. *Speed, Ex'r, v. Tyler's Devisees*709

Constitutionality.

2. Everything is to be presumed in favor of the constitutionality of an act of the legislature, and the party attacking it must aver and prove every fact necessary to establish the position he assumes. *Presiding Judge of Washington County Court v. The Cumberland & O. R. Co.*580

Notice by.

3. An act of the legislature, although technically private in its character, is notice to all the citizens in Kentucky. *Hensley v. Holly & Others*493

SUBSCRIPTIONS.

Release of Subscription.—See Corporations 2.

To Corporate Stock.—See Corporations 1.

Consideration.

Where appellant and others undertook with each other to pay certain specified sums of money to aid in the construction of an improvement for their mutual benefit, the subscription by one was the consideration of the subscription of the others. *Tully v. Cane Run & Kinsmill Tpk. Rd. Co.*.....330

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SUPERSEDEAS.

Appellant Not Bound to Supersede Judgment.—See Appeal 7.

TAXATION.

Persons Liable.

1. The holder of the legal title and the equitable owner of the land are alike bound to submit to the payment of any tax constitutionally imposed, whether it be for the use and benefit of the commonwealth, or a public, or a mere private corporation. *Jefferson Southern Pond & Draining Co. v. Frisbee*.....465

Property Liable.

2. The owner of bank stock is not required to list it with the assessor for taxation, since the liability is on the corporation. *Commonwealth v. Campbell*.....248

Distraining For.

3. Before an officer can distrain for taxes he must tender to the taxpayer a receipt specifying the taxable estate with which he is charged, the value and amount thereof and the taxes due. *Rawbold v. Wilson*281

Tax Lien.

4. Under No. 2 of Act of March, 1862, giving a lien on land assessed for the payment of the tax, such lien is not dependent on the manner in which the land is held, and can not be defeated because the owner has incumbered his title by mortgage or otherwise, prior to the assessment of the tax. *Jefferson Southern Pond & Draining Co. v. Frisbee*465

Failure to Pay Over Taxes Collected.

5. Where a sheriff fails to pay over taxes collected for a county to the proper custodian, the county is the proper party to institute proceedings therefor, and not the custodian of the county funds. *Pollock, Receiver, v. Harding*.....585

Lien of Purchaser.

6. The purchaser of land sold for railroad taxes has a perpetual lien on the property for the amount paid. *Faxon v. Calhoun*.....57

TITLE.

To Devise Property.—See Wills 8.

TORTS.

Liability of City For.—See Municipal Corporations 10.

TRESPASS.

Liability of City For.—See Municipal Corporations 10.

Possession.

1. In an action for trespass to real property, actual possession at the time of the entry of appellant was sufficient to enable appellee to maintain his suit; and it was not necessary that he should show a

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TRESPASS—Continued.

perfect chain of title back to the commonwealth, nor an actual adverse holding for the term of fifteen years preceding the alleged trespass. *McNay v. Harris*104

Railroad's Right-of-way.

2. The action of trespass can not be maintained against a railroad company for entering its right-of-way, where the entry on the land was made while the owners were living on it and no objections were made thereto. *Jouett v. Poplar Mountain Co.*.....641

TRIAL.

Direction of Verdict in Action on Contract of Sale.—See Sales 6.

Offer to Prove Fact.—See Bill of Exceptions 6.

Subscriptions to Capital Stock.—See Mandamus 1.

Findings of Court.

1. Where the law and facts are submitted to the court it acts in the double capacity of judge and jury, and its finding is entitled to the weight of the verdict of a jury, which will not be disturbed unless palpably against the evidence. *Chamberlain & Tapp v. W. J. Brewer*..6

Verdict.

2. When a verdict leaves no fact to be ascertained by the court, but a mere calculation to be made, it is not void. *Hamilton v. Barnes*..167

3. A verdict. "We, the jury, find for the plaintiff six hundred dollars as claimed in the petition," upon which a judgment was rendered for six hundred dollars with interest on the date of the note, was in substance for the debt mentioned in the petition, and authorized the judgment for the amount due with interest thereon. *Chalfant & Morris v. Asbury*.....241

4. The verdict held not sustained by the evidence, but that there was a decided preponderance of evidence against it. *Webster v. Gadlin*320

5. On a traverse, the jury in a circuit court must find the party charged guilty of the offense of which he was found guilty by the jury in the country. *Price v. Gatt*.....572

6. The verdict of a jury, trying an issue out of chancery, is entitled to as much weight as a verdict in a common-law action. *Goode's Adm'r v. Blackwell*.....692

Direction of Verdict.

7. It is error to give a peremptory instruction to find for the defendant where the evidence, when all considered, conduces to some extent to prove the trespass as laid in the petition. *Blunk v. Regatt*..201

Instruction.

8. An objection to an instruction must be made at the time the Court is asked to give it, and if it is then given the ruling of the court must be excepted to. *Cook v. Scott, Adm'r of Robt. Tunis*.....187

9. Where the court substantially instructed the jury that they should

[References are to Pages.]

TRIAL—Continued.

find for the appellant unless they believed he had induced Pitman to trade for the note by conceding that it was a good debt and agreeing he would pay it, it is not erroneous. *Jackson v. Pitman*.....550

10. Where appellant asked for an instruction to the effect that if any witness for appellee had sworn to a material fact on trial, knowing at the time that the statement was false, the jury had the right to disregard the whole testimony, the instruction should be given. *Rucker v. Johnston*.....582

11. An instruction should never be given where there is no evidence upon which to base it. *Godsey v. Godsey*.....627

12. The words, "actual payment," used in instructions, were calculated to mislead the jury and withdraw from their consideration all the testimony bearing on the issue, except that which is direct and positive in character. *Graves, Ex'r, v. Clark's Adm'r*.....639

13. An instruction which selects from all the facts proven those most favorable to the party offering it should be refused. *Graves, Ex'r, v. Clark's Adm'r*.....639

14. Where the jury returned into court and asked that the instructions be simplified, and the court gave oral instructions in explanation of the written instructions already given, such action was error, as the provision of the code requires instructions to be in writing, where either party requests it, and is imperative. *Graves, Ex'r, v. Clark's Adm'r*639

15. If the instructions present the law of the case in an intelligible manner, the Court of Appeals has no supervisory power over them. *Prentice v. Commonwealth*424

16. The trial court is, on motion of either party, required to instruct the jury on the law applicable to the case, and the instructions must be in writing, and in discharging that duty the court may adopt such instructions prepared by the attorneys as he may deem applicable, or he may reject all those thus prepared and write out such as he may deem applicable to the case, and this must be done when the evidence is closed. *Prentice v. Commonwealth*.....424

TROVER AND CONVERSION.**Action—Possession.**

The bare possession of personal property, without the absolute or strict legal title, confers a right of action against a mere wrong-doer having no right and not clothed with any authority from the real owner. *Hunter v. Carter*.....483

TRUSTS.**Creation of Relation.**

1. A trust will not result to sons who furnish their father money, in the absence of proof that it went to pay for the land purchased by the father, especially when the draftsman proves that there was no mistake in the execution of the deed in inserting the father's name as grantee instead of the sons. *Robbins v. Robbins*.....390

[References are to Pages.]

TRUSTS—Continued.

2. When a party executes a deed of conveyance to another and takes a title bond from him to reconvey the property, upon the happening of a certain event, the vendee in the deed becomes the trustee of the vendee in the title bond. *Redmon v. H. C. McGhee & Co.*...427

3. Where K. applied the proceeds of a note to the payment of an individual debt due from P. to himself as executor of M. knowing that the note was owned by an infant, he thereby constituted himself the trustee of the infant. *Kenney v. Kidd*.....546

4. A subsequent purchaser of land with notice of a prior sale is a trustee and holds subject to the prior equity. *Mayo's Heir v. Hager*.619

5. Where it is judicially settled that A. did not appropriate the money of D. to his own use, and that he paid the same to T. and took his note therefor, which note is the subject of the action, it must follow that the note, although made payable to A., was in point of law and fact the property of D., and that A. merely held the same in trust for them. *Strother, Dean, v. Allin's Adm'r*.....642

Liability for Trustee's Debts.

6. Where land is held in trust for another, their beneficial interests are subject to execution, and the trustee can not sell under execution to pay his own debt. *Whitesides v. Brien's Ex'r*.....11

Liability of Trustee.

7. Where a trustee acts in good faith, although it seems that he could have realized out of the trust property the full amount of the debt, he will be charged only with the amount actually received. *Smith v. Pell*285

Reimbursement of Trustee.

8. While the writing, operating as a power of attorney to S., was not a deed of trust or binding on the creditors, yet so far as S. executed the power therein conferred upon him, he is entitled to protection, and as he advanced his private means to carry on the work, he should be reimbursed in full. *Hagan v. English & Murphy*.....467

Compensation of Trustee.

9. As to the claim of the trustees for compensation for services rendered, the paper under which they acted was notice to them that such a claim would be postponed until the preferred creditors were paid in full. *Hagan v. English & Murphy*.....467

Right to Trust Property.

10. A trustee can not execute his trust until he gets into his hands the money due him as trustee, and the plea that he will then betray the confidence reposed in him by his cestui que trust is not a sufficient reason why a debtor shall refuse to pay what he owes to the trustee. *Rudd & Monarch v. Rudd, Trustee, & Taylor*.....517

Execution of Trust.

11. A conveyance to the trustees for the benefit of another divests the grantor of all interest in the trust property, and under the conveyance the cestui que trust has no interest, either legal or equitable, in the execution of the trust. *Lawrence v. Middleton*.....600

[References are to Pages.]

TRUSTS—Continued.**Failure of Use—Reverter.**

12. If the use created by a deed of conveyance fails there will not be a reverter to the estate of the grantor. *Tucker v. Jefferson College*699

Limitation of Actions.

13. Neither the trustee nor his representative can plead the statute of limitation as against the cestui que trust in cases of express trusts, and more especially against the wife, when she has been all the while a feme covert, and the trustee her husband. *Johnson v. Leach's Adm'r*528

Conveyance by Trustee.

14. In order to make valid the conveyance of the trustee it is necessary that the grantor in the trust deed shall join in its execution in all cases in which he retains any interest in the trust property or is directly interested in the execution of the trust. *Donaldson v. Barclay*779

Purchase by Trustee.

15. A trustee occupies such a position as to preclude him from purchasing for his own benefit, trust property from the commissioner under a sale made pursuant to a judgment rendered before he became trustee. *Donaldson v. Barclay*.....779

Suit—Venue.

16. Where appellant might, by a rule in the W. Circuit Court, have been forced to settle his accounts as trustee, being an appointee of that court, still the venue was not local to that court, and appellees might bring their suit in the county where the summons could be served on appellant. *Drake v. Thomas*.....761

Reinvestment of Proceeds.

17. The erection of improvements of a permanent nature upon the real estate not sold is a reinvestment of the proceeds of that which is sold, in other property and such improvements when made will be held for the same uses and trusts and in the same manner in all respects as the land sold. *Speed, Ex'r, v. Tyler's Devisees*.....709

TURNPIKES AND TOLL ROADS.**Pay for Work Done.**

1. Where, when appellee gave up his contract, the Turnpike Company agreed to pay him the contract price for the work done and the estimate was to be made by the appellant's engineer, it was the duty of the company to ascertain the amount due appellee before involving him in litigation. *Mt. Sterling & Spencer Turnpike Road Co. v. Slocum*109

Change of Location—Subscriber.

2. Where appellant's witness proves that the road was located at the time as G. said it was, and it was the agreement of the parties that H. would waive his right to compensation for the roadbed taken if the

[References are to Pages.]

TURNPIKES AND TOLL ROADS—Continued.

road should be located through his land, that he afterwards changed his mind as to damages, and that caused the change in the location, it was not such a change as would affect the right of a subscriber to the capital stock. *Hunt v. Winchester & Red River Iron Wks. T. R. Co.*356

USURY.**Estoppel.**

The written acknowledgment of defendant that all usury included in his individual debts to plaintiff was stricken out in their settlement before the execution of the note sued on, not being contradicted by any testimony in the case, concludes him on that point. *Green v. Secrest*375

VARIANCE.

How Taken Advantage of.—See Process 1.

VENDEE'S LIEN.

Abandonment of Parol Contract of Sale.—See Vendor and Purchaser 8.

VENDOR AND PURCHASER.

Preferred Lien of Purchase Money Note.—See Bills and Notes 14.

Parol Agreement to Convey.

1. The courts can not enforce a mere parol agreement for the conveyance of land, but such contract may be rescinded upon equitable terms. *Tripplett v. Tripplett*.....704

2. A parol contract for the sale of land is not binding on either party. *Gudgell v. Moses*.....646

Misrepresentation by Vendor.

3. A magnified representation as fact, not merely as an opinion. may, if false, entitle the vendee to relief, although the vendor may have believed what he said, the assertion of a fact being equivalent to a warranty if the asserter did not know the truth of what he affirmed, and it would be a fraud if he knew it to be untrue. *Hinthia v. Lovelace's Adm'r*.....687

Constructive Possession.

4. The delivery of the key to the dwelling house was only constructive possession which did not deprive the appellants of the actual possession. *Gudgell v. Moses*.....646

Conveyance in Consideration of Support—Lien.

5. Where a father conveyed land to his son for a money consideration and the further consideration of support by the son on the land during the father's life, and prior to a filing of the petition to cancel the deed to the land creditors of the son had attached the land, the father has the lien on the land for his support during his life, and such should have been enforced in chancery instead of cancelling the deed,

[References are to Pages.]

VENDOR AND PURCHASER—Continued.

and the father be permitted to live on the premises during his life, and the land subjected to the debts of the attaching creditors in proper proceedings. *Prichard & Bolt v. Lewis*.....583

Rescission of Contract of Sale.

6. The inability of H. to convey in accordance with the stipulations of his title bond and the refusal of the chancellor in the exercise of his discretion in the premises, to sell the land of his infant children, rendered the rescission of the contract of sale irresistible. *Harris v. Field's Ex'tx*.....559

Purchase Money.

7. Where a judgment complained of recites the fact that W., to whom the purchaser's money for a house and lot was due, has been paid by K., the appellee, it is but equitable that he should have the benefit of his security. *Crutcher v. Keith*.....46

Vendor's Lien.

8. Appellant's vendor, having elected to abandon the parol contract for the sale of the land to their ancestor, they have a lien on the land for the purchase money, and his subsequent vendee, with notice of appellant's lien, can occupy no better position than his vendor. *Wormick v. Bryant*.....9

Purchase Subject to Vendor's Lien.

9. If a party purchases land with constructive notice of a vendor's lien, the law furnishes no means of escape from the burden. *Smith v. Harrison*317

Vendor's Lien—Waiver.

10. Where the vendee was present when the deed was written, and accepted it after acknowledgment, a parol agreement to waive the lien for the purchase money must be regarded as having been changed. *Smith v. Harrison*.....317

Title Bond.

11. The holder of a title bond for land, executed by a person who has since died, must produce satisfactory evidence of the signature of the deceased before he can recover against the heirs. *Stewart v. Stewart*319

Title Bond—Attachment by Creditors of Vendor.

12. Where A. has a bond for title to land from B. and C., and after the date of the bond the land is attached by the creditors of B. and C., A.'s equity will prevail. *Mulligan v. Neeter*.....103

Title Bond—Default—Lien.

13. Where by the terms of a title bond appellant was only bound to convey the land by deed of general warranty when the purchase money was all paid, on default of appellee the court should render judgment, not only for the purchase money, but should adjudge a lien on the land with means of enforcing it. *Cushman v. Garther*.....183

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VENDOR AND PURCHASER—Continued.**Recitals of Bond.**

14. Where a debtor in possession of land contracts for the purchase of it, and by recitals of the bond his wife holds the equitable title, the recitals are not evidence against a stranger to the transaction, although evidence of the facts recited as between the parties. *Samuels, Arnold & Co. v. R. N. Henderson & Co.*.....210

Liability of Purchaser.

15. Where appellants in their answer state that pending the treaty for the sale of the property, appellees fraudulently misrepresented to them the boundaries of the land and fraudulently concealed from them that there was a hostile title and rival claim to fully one-third of the most valuable part of the lands, but they say they were not sufficiently advised then, to state whether the pretended or asserted claim to the land is valid or not; that they had been informed that it was not; but that the Red River Iron Manufacturing Company makes claim to a part of said land, which is to that extent a cloud upon their title and detrimental to them, which appellees fraudulently concealed from them and thereby induced them to make a contract which they would not have otherwise done, and they are informed that there are large outstanding liens upon the land which are superior to that of plaintiffs; that if they ever accepted the deed from appellee's it was done by mistake on their part, as to its purport, and that it contains exceptions that they did not fully understand; held that unless the vendee was deceived and induced by the fraud of the vendor to accept the title, he must pay the consideration. *Roberts v. McKinney & Bros.*.....293

Negligence of Purchaser.

16. Where a purchaser fails to make an investigation as to which of two houses he has purchased, when the facts are given him, he is culpably careless and the law can afford him no relief. *Ballard v. Lowery*203

Execution After Contract of Sale.

17. Where a contract for the sale of land was made before the execution issued against the vendor and after the vendee took possession of the land, all the vendee, in any event, could claim was that her money be refunded by giving her a credit with the amount. *Edwards v. Craddock*.....49

Deficit or Surplus.

18. If there is fraud or mistake in the conveyance of land or the deficit of surplus is so great that if the same had been known, the sale would not have been made on the terms expressed, relief will be granted, otherwise not. *Rusk v. Graves*.....417
19. Where land sold in gross for 25 acres only contains fourteen acres, the deficit is so great as to show that both parties were laboring under a mistake as to the number of acres contained in the tract. *Hand v. Elbeck*.....488
20. Where a vendor of land knew when he made the sale that the contract did not contain 250 acres, as supposed by the purchaser, it

[References are to Pages.]

VENDOR AND PURCHASER—Continued.

was his duty to disclose such fact to the purchaser at the time of the sale. *Prisler v. Shwabeston*.....257

21. Where the vendor of land is unable to make title to the whole tract sold and his vendee is willing to accept title for so much as he is able to convey, he shall make remuneration in damages or deduct from the price the proportional price of the whole tract for so much as he is unable to convey. *Spurlick, Assignee, v. Johnson*.....252

22. The deficiency of nine acres, if clearly shown to exist, is too small to entitle the purchaser to any relief for a mere mistake or error in judgment as to the quantity of land contained in the tract. *Bondurant v. Ewing*.....150

23. The deficit of one-half or three-quarters of an acre, in a tract of twenty-five acres, sold at \$2.00 per acre, is too small a matter to authorize a reversal, as it might have resulted from the smallest mistake in the work, or of a variation in the instruments. *Chandler v. Chandler*19

24. In contracts for the sale of land, where a part of the tract sold is lost to the purchaser, he is entitled to an abatement to be ascertained by reference to the price of the whole tract and by its relative value when compared with the balance of the tract. *Campbell and Wife v. Duerson*.....30

25. The criterion of recovery for deficit in land sold is the proportionate price of the deficit to the original amount paid. *Jones v. Talbott's Adm'r*.....37

Pleading.

26. In order to entitle the holder of a note for purchase-money to a lien on the land, it must be alleged in the petition that a lien was reserved on the land for the unpaid purchase price. *Kittenger v. Humphreys, Jett & Co*.....510

Pleading.

27. In an action by a vendee to recover damages for deficit in land sold, the general rule will prevail, unless there is an allegation in the petition sustained by the proof, showing that the land which the vendor could not convey was more valuable per acre than that which he could convey. *Spurlock, Assignee, v. Johnson*.....252

28. Where appellee took the strip of land subject to the contingency that when F. dedicated 25 feet of land on the same line to a street, she would dedicate the same quantity to the same purpose, and it is not alleged that the strip had been appropriated to the street or that appellant was not in the possession and enjoyment of the land at the time he filed his cross-petition, he shows no grounds for relief. *Hutchison v. Akin*.....373

Defense of Purchaser.

29. A purchaser pendente lite can avail himself of no defense other than could have been made by his vendor. *Patrick v. Bohannon*....259

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VENDOR'S LIEN.**Purchase With Constructive Notice of.**—See Vendor and Purchaser 9.**VERDICT.****Not Sustained by Evidence.**—See Trial 4.**Weight of.**—See Trial 6.**VESTED RIGHTS.****Purchaser at Execution Sale.**—See Execution 20.**WAIVER.****By Husband of Right to Wife's Property.**—See Husband and Wife 16.**Error in Proceeding by Motion.**—See Motions.**Irregularities in Pleading.**—See Pleading 15.**Landlord's Lien.**—See Landlord and Tenant 7.**Objection to Rulings of Court.**—See Evidence 18.**Of Exception to Evidence.**—See Appeal 21.**Of Order Dismissing Case.**—See Dismissal and Non-Suit 3.**Of Right of Action.**—See Bankruptcy 4.**Of Written Notice to Sue.**—See Principal and Surety 6.**WAR.****Taking Personal Property.**

1. If personal property be taken by the government and be applied to public use, until just compensation be made, the owner, though deprived of the possession, against his will, yet retains the title, and the incidental right of recaption as a security for payment, unless in a reasonable time the value shall have been legally fixed and paid or offered, but the danger must be imminent and impending before the taking can be authorized. *Howard's Adm'r v. Cooper*.....553

2. Where property is taken under orders of a superior officer it must be valued by disinterested persons and the evidence of the taking for the public service, with the evidence of its value, must be given to the owner, so as to enable him to hold the government responsible for its value and there must be evidence of the pressing necessity for the taking. *Howard's Adm'r v. Cooper*.....552

WILLS.**Testamentary Capacity.**

1. Where a testator at the time of executing his will was laboring under a great prejudice toward his daughter-in-law and her children by testator's son, the cause of her separation from her husband and the suspicion upon the part of himself and family that she was instrumental in the death of testator's son, but the testator afterward became convinced that his suspicion against the daughter-in-law was without foundation and that he had made a will that would have the

[References are to Pages.]

WILLS—Continued.

effect of disinheriting her children without sufficient cause, but testator died without revoking the will, at the time the testator executed the will he was laboring under such a degree of hatred and prejudice toward the daughter-in-law and under such a fixed delusion as to her agency in bringing about the death of his son as to render testator insane as to her and her children, and consequently at that time his mind was not in a proper state for disposing of his estate, and after he realized the delusion under which he acted in making the will, he had become so completely under the domination of the appellee that he did not have the moral courage to destroy it. *Ridgway v. Hall*. 387

2. A married woman can dispose of, by will, only such estate as is secured to her separate use by deed or devise, or in the exercise of a special power to that effect. *Daniel's Devisees v. Daniel*. 670

3. Under the statute, any right or interest in real estate which the testator may be entitled to at the time of his death, which would otherwise descend to his heirs, may be disposed of by will. *Preston v. Woolly* 511

4. Where, on account of the testator's extreme age, his mental faculties were considerably impaired, and he exhibited evidences of a disordered intellect; but on the day of the execution of his will he was sufficiently in possession of his intellectual powers to dictate the provisions of the instrument and sufficiently self-possessed to investigate and understand its contents, he had testamentary capacity. *Strunk & Others v. Dulton & Wife*. 300

5. Land held in adverse possession may be disposed of by will. *Preston v. Woolly* 511

Land Held in Adverse Possession Devisable.—See Wills 5.

Property Subject to Disposition by Will.

6. Where the devise from the first husband did not secure to his widow separate estate in the property she acquired thereunder, and her estate was changed from general to special by her own acts, she had no power to dispose of such estate by will. *Daniel's Devisees v. Daniel*. 670

Undue Influence.

7. Where the decedent, previous to the execution of the writing purporting to be his will, had been ill for some time, and during the last ten days previous to his death his suffering was intense, and only relieved by the constant use of stimulants and opiates and his nervous system was much deranged, and he was kept alive by the constant use of opiates, and he had been resisting importunities of his son and wife to make his will and declared that he intended that his children should be equal and repeatedly refused to execute a will and no consent was obtained from him that such a paper should be written until the night previous to his death, and while the alleged will was being written opiates or stimulants were administered freely and two fans kept constantly in use in order to sustain life, and many witnesses gave state-

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WILLS—Continued.

ments as to his delusions and the wanderings of his mind for two days and more preceding the writing of the will; his mind was not in such a condition as to have enabled him to have a fixed and settled purpose of his own in regard to the disposition of his property. *Cundiff v. Cundiff*90

Title by Bequest—When Passes.

8. Although the testator may have written a codicil to his will devising the note in question to the wife of appellant, it passes no title to it until the will is properly probated. *Wilkerson v. Keas, Admr.*...713

Sale and Reinvestment.

9. Where all persons interested, including all the great-grandchildren of the testator in esse, are before the court, the proceeding is within the letter of the statute, and the possibility of the birth of other great-grandchildren who may take under the will does not take away from the chancellor the power to act in the premises. *Speed, Ex'r, v. Tyler's Devisees*709

Construction of Will.

10. Where will provides: "After the payment of my just debts as above directed, I will and devise to my wife, Mary Cravens, an equal half of my entire estate, real, personal and mixed, and she is to have the said half of my estate hereby devised to her, to do with and dispose of as she may please," the language used by the testator excludes the idea that it was his intention to settle the property devised to his then wife to her separate use and benefit to the exclusion of any husband that she might thereafter have. *Daniel's Devisees v. Daniel*670

11. Where by the will of the testatrix, a trust was created for the benefit of her daughter for life and at her death the estate was to go to her issue, but no disposition was made of the remainder, in the event the daughter has no issue she takes the remainder in fee. as heir at law of her mother. *Fackler v. Fackler*658

12. The devise by a husband to his wife for "her life time, or as long as she remains unmarried, for the support of my children," is a devise to the wife in trust for the children. *Grohegan v. Buler's Adm'r*645

13. Where a will provides: "All the estate loaned to testator's wife, except the land already disposed of, shall be divided into six equal parts, giving to the grandsons one equal part with the testator's children, and if either one of the six shall be dead (that is, at the death of the wife), leaving no child or children, then his or her part, so dying, is to revert back to the testator's estate and be equally divided among his surviving children and the children of such as may be dead," it was the intention of the testator that if either died, his or her part should revert back to the survivors. *Robertson v. Ultinger*.....576

14. Where a will provides that "in the event of the death of my son, J. without children, then, in that event, after the death of my son

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WILLS—Continued.

J.'s wife, whom I will and desire shall enjoy and have the use of said property during her life, I will all of said estate of any kind and description, to my four grandchildren, share and share alike," as J. died leaving a son, the contingency upon which the devise over of a life estate to appellee did not happen, J. took the estate in fee simple. Woods v. Woods323

15. The term "want." used in a will, is as imperative as the word "desire," and is sufficient to indicate the intention of the testator. Sloan v. Stone310

16. Where a will provides: "I will and bequeath to Harriet Evans twenty acres of land, to hers and her children's," etc. "If she, Harriet, should prefer selling the land authorize my executor to sell it for her and invest the money in any safe manner for the benefit of her and her children," the discretion to be exercised as to whether or not a sale is to be made of the property is left with Harriet Evans alone, but the power to sell and reinvest the proceeds is with the executor, the intention of the deviser being to give Harriet a life estate in the land, with remainder to her children. Reed v. Reed408

17. Under the will "I will and bequeath the residue of my estate to my wife, to be used, controlled, managed and possessed by her. in order that she may be able to raise and educate our infant children. If any of our children shall become of lawful age and need some assistance during the time that my wife retains all the estate, I want her to afford them such assistance as she may be able to do without inconvenience to herself, provided my wife shall at any time see proper to marry, then, in that case, my will is that she shall have a lawful third of my estate during her natural life, and after her death returned to my children," the wife took a life estate only. Sloan v. Stone310

18. Where a will provides: "I give to Mildred Brusaugh the plantation upon which we now reside, until the youngest child she has had by me may arrive at twenty-one years of age, for the purpose of raising said children, and the youngest becomes of age, I then wish them to sell my land and divide the money between them, and I appoint Mildred Brusaugh my executrix," it was the intention of the testator that the persons described as his children should take the estate as a class until the youngest arrived at the age of twenty-one years, and until that time it was to be left for the support of the beneficiaries, and if either or all of them, except the youngest, should die before she attained the age of twenty-one years, the executrix was to retain the estate to raise such child, and the estate will pass to the survivors in case of the death of any of them before such time without issue. Bryant v. Eskridge.....218

19. Where a testator devises all the remainder of his estate to be sold by the executor and land purchased with the proceeds for the testator's wife and children, and after publication of the will the testator sold most of the property devised and took notes therefor,

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WILLS—Continued.

with a lien on the land, and the executor collected the notes and claims, the sale by the executor was a revocation of the devise. It is held that nothing but the power to sell was devised to the executor, and nothing but the proceeds of the sale was bequeathed to the testator's wife and children, and that the bequest to them was a demonstrative legacy not revocable by a mere ademption of the security. *Redding, Executor, v. Alsop*.....413

20. Where a will provides: "First, my just debts must all be paid, and second. I will to my wife, Elizabeth, and her heirs forever, the one-half of my entire estate," the widow is entitled to one-half of the entire estate after deducting therefrom the debts of the testator. *Spalding's Ex'r v. Spalding*.....138

21. Where a will provides: "I desire that the perishable part of my estate be immediately sold after my decease, and also my real estate (the farm on which I now live), but I desire it to be divided in three parts best suited for a farm in each part, and sold separately, but if this can not be done then I desire it to be sold altogether," the provisions in the will to divide the land in three parts before selling was merely directory and the executor had the power to use his discretion in that regard. *Spiers v. Ament's Ex'r*.....135

22. Where under a will, if a devisee should leave children or issue surviving her, they should take the estate in fee, such contingency depending on events which may or may not happen, the persons who may take such future interest can not for the time being be ascertained on account of the non-happening of the events on which such interest depend. *Dorn v. Keller*.....40

Scope of Will.

23. Where a will directs the sale of the testator's real estate to provide an income for the use of the widow for life, neither the principal funds to arise from the sale nor the personal property is devised. *Short's Ex'r v. Short*433

Bequest or Devise in Trust.

24. If a gift in a will is expressed to be for the benefit of another, or to be at the disposal of the donee for herself and children, or for the support of herself and family, equity will declare a trust therein and see that it is faithfully executed. *Sloan v. Stone*310

Vendible Interest in Devisee.

25. The right to use, control and manage property is not sufficient to invest the devisee or legatee with a vendible estate therein, nor to give him the right to pledge or charge such property for the payment of the testator's debts. *Sloan v. Stone*310

Revocation.

26. Where a will provides: "It is my desire that after the payment of my debts and said legacy, all the remaining part of my estate, in the State of Mississippi, both real and personal, be sold by my executor and converted into money, and said money be applied by my executor to buy land in the State of Ohio for Mary and her six children," and

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WILLS—Continued.

after the publication of the will the testator sold the most of the property and took notes therefor with a lien on the land, and the executor collected the notes and claims that the sale by the executor was a revocation of the devise, it was held that the specific devise of land and the subsequent sale of the land by the testator and appropriation of the proceeds for his own use amounted to a presumptive ademption of the devise, but such prima facie presumption may be repelled by extrinsic proof that the revocation was not intended. *Redding, Executor, v. Alsop*413

27. The widow having taken under the will with knowledge of her rights, she, if living, could not revoke her election and her devisee cannot do so after her death. *Mitchell's Heirs v. Thompkins' Adm'r.*161

Setting Aside Will.

28. A judgment based on a verdict setting aside a will will not be disturbed, where the proof shows that the testator was old and of intemperate habits at the time of the execution of the instrument, especially where he was under the influence of his wife, and from the further fact that the paper was carried to another state and eventually fell into the hands of the appellant, which, perhaps, prevented its effectual revocation. *Richardson v. Sheldon*435

Election to Take Under.

29. Where the wife lived more than 25 years after the death of the testator and never renounced the provisions of the will, nor ever claimed any right to dower or distribution as a widow unprovided for, but acquiesced in and held under the will as a devisee, it amounted to an election to stand by and take under the will. *Mitchell's Heirs v. Thompkins' Adm'r*161

Accepting Devise With Burden.

30. Where testatrix devised to her son A. a house and lot for which she was indebted in the sum of \$1,500, for which there was a lien on the property, and she made some other specific devises; and without giving directions as to the payment of her debts, provided that the balance of her estate, both real and personal, be divided between her daughter and her sons, J., G. and A., although the creditor might have enforced his lien as security for his debt, it was nevertheless as much the debt of the testatrix as if the lien did not exist, and the acceptance by A. of the devise to him did not imply an undertaking on his part to assume and pay the debt, nor exempt the general devisees from contribution thereto, but, on the contrary, as between him and the devisees of the residuary estate, he was exempt from contribution. *Blanchard v. Herbert*8

WITNESSES.

Competency.

1. As a general rule a witness must have a direct and certain interest in the result of the suit to render him incompetent, and if he is neither to gain nor lose by the result and the verdict cannot be used as evidence in his favor he is competent; a contingent or doubtful

[References are to Pages.]

WITNESSES—Continued.

interest goes only to his credibility. *Todd's Adm'r v. Southgate's Ex'r*728

2. A witness being incompetent when his deposition is taken, a subsequent verdict in his favor cannot be made to relate back to that time, so as to remove the bias under which he then labored. *Hamilton v. Barnes*167

Privileged Communications.

3. Where defendant told plaintiff that he wished plaintiff to fix up a title to some land as he wished to pay plaintiff money which plaintiff had advanced to him to start him in the saloon business, and that he was indebted to plaintiff for the money advanced, and would pay him in the land, the business of plaintiff was to fix up a title to the land, and a statement that defendant wished the land to secure the debt to plaintiff had no particular relations to the business to be transacted and constituted no part of the instructions necessary to the performance of the professional duty in which plaintiff was engaged, and plaintiff was under no obligations to keep it secret because of his relation as attorney. *Morton v. Morris*.....127

Cross-Examination.

4. Where a witness was summoned by the commissioner to testify in the case, and from the affidavit filed it appears that the counsel for the appellant had ample time to cross-examine, and the cross-examination was postponed at his instance, appellee was not compelled to produce the witness in order that he might be re-examined. *Newton v. Newton*454

WORK AND LABOR.

Recovery on Quantum Meruit for Services Rendered—See Contracts 10.
Implied Promise to Pay.

Where appellant for five years prior to decedent's death performed all the household services required of her, a promise to pay therefor will be implied unless she was laboring for deceased without expectation of compensation. *Sanders, Adm'r, v. Waddy*720

WORDS AND PHRASES.

The words "actual payment," used in instructions, were held to mislead the jury and withdraw from their consideration all the testimony appearing on the issues, except that which is direct and possible in character. *Graves, Ex'r, v. Clark's Adm'r*639

The terms "assign" and "transfer," when applied to contract of sale of promissory note, are frequently used synonymously. *Wright v. Bank's Ex'r*717

The terms "transfer" and "assign," when applied to contract of sale of promissory notes, are used synonymously by the general public and also in some instances by the court. *Wright v. Bank's Ex'r*717

The word "want" as used in a will, is synonymous with "wish," and is as imperative as the term "desire," and is sufficient to indicate the testator's intention. *Sloan v. Stone*310

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